

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





# 77-1150

To be argued by  
PATRICIA M. HYNES

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## United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1150

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

AMREP CORPORATION, RIO RANCHO ESTATES,  
INC., ATC REALTY CORPORATION, HOWARD  
W. FRIEDMAN, CHESTER CARITY, HENRY L.  
HOFFMAN, and DANIEL FRIEDMAN,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### BRIEF FOR THE UNITED STATES OF AMERICA

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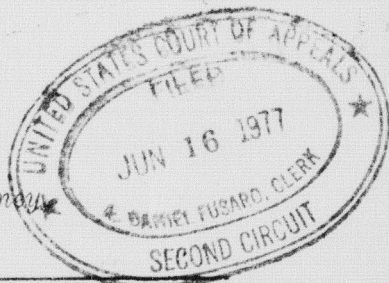
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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 77-1150**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

AMREP CORPORATION, RIO RANCHO ESTATES, INC., ATC  
REALTY CORPORATION, HOWARD W. FRIEDMAN,  
CHESTY CARITY, HENRY L. HOFFMAN, and DANIEL  
FRIEDMAN,

*Defendants-Appellants.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

AMREP Corporation ("AMREP"), Rio Rancho Estates, Inc. ("Rio Rancho"), ATC Realty Corporation, ("ATC"), Howard W. Friedman, Chester Carity, Henry L. Hoffman and Daniel Friedman appeal from judgments of conviction entered on March 10, 1977, in the United States District Court for the Southern District of New York, after a ten-week trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 76 Cr. 644,\* filed on July 13, 1976 in eighty counts, charged the defendants in seventy counts

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\* This indictment superseded 75 Cr. 1023, filed on October 28, 1975.





with violating the mail fraud statute, Title 18, United States Code, Section 1341, and in ten counts with violating the fraud provisions of the Interstate Land Sales Full Disclosure Act, Title 15, United States Code, Section 1703(a).

As a result of certain pre-trial rulings of the District Court, dismissing fifty counts of the superseding indictment and precluding introduction of certain material evidence at trial,\* the Government appealed to this Court on October 27, 1976, pursuant to 18 U.S.C. § 3731.

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\* At a series of pre-trial conferences, the district judge complained of the length and detail of the original 80-count indictment, 75 Cr. 1023, filed on October 28, 1975. Thereafter, the Government filed a superseding indictment which, while it realleged the same substantive charges, deleted much of the evidentiary detail contained in the original pleading. At pre-trial conferences held on July 19, 26 and September 22, 28, 1976, the District Court directed the Government to designate portions of the original indictment on which it would not offer any proof at trial under the superseding indictment. The Government advised Judge Metzner by letter dated July 22, 1976, that it could not bind itself pre-trial not to offer proof on particular issues. On October 21, 1976, the district judge ruled that the Government would be precluded at trial from introducing five specific evidentiary items reference to which had been deleted from the superseding indictment. See, *United States v. AMREP Corporation*, 545 F.2d 797, 799-800 (2d Cir. 1976). The trial judge also excluded the grand jury testimony of co-defendant Solomon Friend, on the ground that admission of such testimony would violate *Bruton v. United States*, 391 U.S. 123 (1968). The trial judge also directed the Government in effect to elect only 20 mail fraud counts of the indictment, prior to trial, on which the case would be submitted to the jury. While the Government consented to proceed with only 20 counts, it objected to a forced election prior to trial. On October 22, 1976, the Government complied with the District Court's direction, over objection, and Judge Metzner then dismissed the remaining 50 mail fraud counts. These rulings were all reversed by this Court.

Following oral argument on October 29, 1976, a panel of this Court (Lumbard, Van Graafeland, J.J.) (Bonsal, D.J., dissenting), reversed Judge Metzner's pre-trial rulings. *United States v. AMREP Corporation*, 545 F.2d 797 (2d Cir. 1976).

Thereafter, trial against defendants commenced on November 3, 1976. Twenty mail fraud counts and five interstate land sales counts were submitted to the jury,\* and on January 24, 1977, the jury returned verdicts of guilty against all of the defendants on all counts.

On March 10, 1977 Judge Metzner sentenced the four individual defendants to concurrent terms of six months' imprisonment on each of the twenty-five counts, AMREP was fined \$1,000 on each of the 20 mail fraud counts and \$5,000 on each of the five interstate land sale counts, for a total of \$45,000 in fines. Defendants Rio Rancho and ATC, each wholly-owned subsidiaries of AMREP, were not fined.

The individual defendants have been released on their own recognizance and the \$45,000 in fines are presently being held in an escrow account pending this appeal.

## **Statement of Facts**

### **The Government's Case**

#### **A. Synopsis**

The Government's proof at trial demonstrated that from 1961 to the filing of the indictment the defendants devised and engaged in a massive nationwide land fraud scheme to sell unimproved desert lots in a 91,000 acre

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\* The charges against three defendants, Irving W. Blum, Herman B. Oberman, and Solomon H. Friend, were dismissed at the close of the Government's case.



subdivision in New Mexico, named "Rio Rancho Estates," by means of high pressure selling techniques and false, fraudulent and misleading statements as to the value of these lots as sound and profitable financial investments. Defendants' scheme centered around a compelling sales pitch that represented that lots at Rio Rancho Estates were safe, risk-free financial investments which could be resold at substantial profits, and that an investment in Rio Rancho lots was safer—indeed more lucrative—than an investment in stocks, bonds, mutual funds, insurance or even putting money in the bank. In a carefully tailored and deliberate sales program that made principal use of high-powered sales dinners, investors were led to believe that Rio Rancho lots were rapidly increasing in resale market value and that purchasers could realize up to 25% per year or more on an investment in Rio Rancho lots, representations which the proof amply showed were simply false.

Defendants represented to potential investors that the purchase of Rio Rancho lots was a "guaranteed and protected" investment, because Rio Rancho Estates was located northwest of the City of Albuquerque, New Mexico, that Albuquerque was hemmed in on three sides, was "bursting at the seams," and could only grow to and through Rio Rancho Estates. Thus, purchasers were directly and falsely encouraged to believe that there would be a great demand and a profitable local resale market for Rio Rancho lots. Investors were also led to believe that the lots they were buying would be improved with water, utilities and paved roads, thereby enhancing resale value. Until at least the early 1970's, many purchasers also were told that Rio Rancho lots were almost sold out and that the defendants would soon be setting up a resale office to resell lots for investors.

Contrary to defendants' representations, the evidence established that the purchase of lots at Rio Rancho

Estates was a financial investment which was neither safe, secure nor profitable. Rio Rancho lots were not increasing in resale market value, a fact well known to the defendants because over the entire 15 year period of their sales efforts there had not been any resale market in Albuquerque. The oft-repeated and central sales theme that Rio Rancho Estates was the only available land into which Albuquerque could grow, was absolutely false. In fact, there was abundant vacant land in and closer to the city of Albuquerque than Rio Rancho Estates into which the city could expand, and there was no reason to believe there would be a resale market for Rio Rancho land. The lots defendants were selling nationally as financial investments had not been improved with water, utilities, or paved roads during the 15 years in which they had been sold, nor did defendants intend to do so in the future, notwithstanding the fact that they charged customers for these improvements. Finally, the defendants never set up a resale office. Instead, when the initial 54,000 acres purchased in 1961 were almost sold out, the defendants, beginning in late 1969, purchased an additional 37,000 acres of land, thereby further diminishing any possibility of resale by investors.

Defendants' scheme was as enormously successful and profitable as it was permeated by false and misleading representations. They purchased the first 54,000 acres in 1961 for \$178 an acre, and purchased all but 2,500 of the additional 37,000 acre tract for an average price of \$180 an acre some 8 to 10 years later. Prior to the indictment in this case the defendants were selling unimproved acre "homesites" for prices ranging from \$6,200, to as much as \$11,800, while half acre "homesites" were sold for prices ranging from \$3,500 to as much as \$5,700. Unimproved "commercial" and "multiple dwelling" lots, which were less than a quarter acre, were selling for prices ranging from \$3,150 to in excess of \$25,000. More than 77,000 lots were sold to approximately 45,000 people in 37 states and overseas. Inves-

tors in these lots were primarily middle income, blue collar workers, and military personnel stationed overseas. Lots were also sold to foreign nationals overseas. Total sales amounted to 170 million dollars and quickly would have totalled more than 200 million dollars had the scheme not been halted by this prosecution.

## **B. Acquisition and Subdivision of the Land**

In July, 1961, Herman Oberman \* and defendant Henry Hoffman negotiated the purchase of a 54,000 acre tract of semi-arid desert land in Sandoval County, New Mexico, at a price of \$178 an acre (GX\*\* 806 pp. 058154-55; GX 612 p. 1 ¶ 12). Defendant Rio Rancho Estates, Inc., a wholly-owned subsidiary of AMREP, was formed to take title to this tract of land and to subdivide and sell it.

The 54,000 acres then were subdivided in gridiron fashion (GX 93) by bulldozing dirt roads and staking boundary corners, forming unimproved desert lots that the defendants called "homesites", "commercial" and "multi-dwelling" lots and "ranchettes". Generally the so-called "homesites" lots were half acre lots, although some were larger. The so-called "commercial" and "multi-dwelling" lots were less than a quarter of an acre. The "ranchettes" were several acres—sometimes 3 to 10 acres—mainly because the terrain was so rough the land could not be subdivided into anything smaller. (GX 918 p. 2; A. 10672).

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\* Herman Oberman was President and a Director of AMREP and Rio Rancho in 1961.

\*\* "GX" refers to Government exhibits introduced at trial, many of which, but not all, are reproduced in the joint appendix with a citation reference to the appendix. "DX" refers to defendants' exhibits offered at trial. "A" refers to the joint appendix. References to defendants' brief are cited as "Br."



In 1962 AMREP filed a registration statement—signed by defendants Chester Carity, as Treasurer and Director, Henry Hoffman as Director, and Howard Friedman as Secretary, Comptroller and Director, among others—with the Securities and Exchange Commission.\* The statement set forth what the defendants intended to do with the tract of land:

“The unsold land may be considered raw land which is to be improved by the Company only by the construction of roads.” (GX 400B pp. 13, 15 A. 10402-04).

### C. How The Lots Were Sold

Lots at Rio Rancho Estates were sold almost exclusively to people living outside of the state of New Mexico.\*\* From 1961 to 1964 Rio Rancho lots were nationally advertised in newspapers and magazines and were sold through the mail as well as by visits to the

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\* The individual defendants have held various offices in the defendant corporations, as set forth on charts in evidence. [See GX 1550 (AMREP); GX 1551 (Rio Rancho) and GX 1552 (ATC)]. The stock ownership of the individual defendants in AMREP is also set forth in GX 1550.

At the time of the filing of the indictment defendant Howard Friedman was the President and a Director of AMREP and Rio Rancho and a Director of ATC. Defendant Chester Carity was Executive Vice-President and a Director of AMREP and Rio Rancho and the President of ATC. Defendant Henry Hoffman was Senior Vice President and a Director of AMREP and Rio Rancho until September of 1974 when he became a consultant but remained as a Director of AMREP and Rio Rancho. Defendant Daniel Friedman was Senior Vice President of sales and a Director of AMREP and a Vice President of Rio Rancho.

\*\* A registration statement filed with the SEC stated that “in excess of 98% of sales of lots at Rio Rancho Estates has been made to persons living outside of New Mexico”. (GX 395; A. 10398.)

home. (GX 395; A. 10397). Beginning in 1965, however, defendants started to hold free sales dinners to which prospective purchasers were invited. These sales dinners, conducted by salesmen carefully trained by the defendants in the manner in which sales could be quickly consummated and urged to capture their sales the same evening, proved to be enormously successful and became the focal point of the sales effort from 1965 forward. (GX 669a; GX 669; A. 10525-46; GX 752A; A. 10579-600; GX 752Z; A. 10601-632; GX 993; A. 10707; GX 993A; A. 10713; GX 749; A. 10569). Following consummation of a sale at the dinners, the sales program shifted emphasis to assuring that the investor remained convinced and, whenever possible, to encouragement of further financial investment, thereby deepening the purchaser's commitment to Rio Rancho. (GX 203(a); A. 10229-34; GX 750; A. 10575; GX 1000, A. 10720-21; GX 122(l), A. 10135; GX 123(f), A. 10136; GX 128(f), A. 10144; GX 146m; A. 10171; GX 167(i); A. 10220-21).

### **1. The Sales Dinners and the Basic Factual Representations**

The sales dinners were highly organized and employed a set format which had to be followed. (GX 669a; GX 669 A. 10525-46; GX 749, A. 10569; GX 752A; A. 10579-600). A principle feature of the dinners was use of high pressured and deceptive sales techniques, designed to create a sense of urgency to pressure people into signing land purchase contracts that same evening. (GX 669a; GX 669; A. 10525-46; GX 752A; A. 10579-600; GX 531; A. 10472-73; GX 993; A. 10707; GX 993A; A. 10713). It was the combination of high pressure sales techniques together with false and misleading claims about the investment value of the lots which made the dinners enormously successful.

Invitations to sales dinners were sent to people through the mail. Names were selected from mailing lists based upon income, (Perlmutter, A, 3304-05), with the target group primarily blue collar workers. Mailings were sent to people living in a given geographical area and dinners were held at local restaurants and hotels in those areas.

Upon arrival for the dinner prospective investors were seated at a table with a salesperson. There also was a speaker in the front of the room. The salespeople, called "land consultants", were introduced and held out as persons qualified to give knowledgeable investment advice. (GX 316; A. 10274; GX 671; A. 10549). Once seated at the table, the salesperson gave the prospective customer a "Confidential Survey" to complete. The "survey", which sought information about the guest's financial investments, and what, if any, investment "plan" for the future was envisioned by the customers,\* was used as a warm-up. (GX 752A; A. 10582).

After the warm-up period, the speaker took over, using a prepared script, (GX 671; A. 10547; GX 314; A. 10246; GX 315; A. 10258; GX 316; A. 10274; GX

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\* The survey contained the following questions.

- "7. Do you now have an income plan for your future?  
Yes — No —
8. What percent return are you receiving on your top investment?  
——%
9. If you were shown an investment program that *has consistently outperformed* the above return, what amount could you set aside per month?  
(Please check one)  
\$40 — \$50 — \$65 —  
\$85 — \$100 — More —"
- (GX 256; A. 10239-40) (Emphasis added);  
(See also GX 347F; A. 10339).



317; A. 10298) which was written in house at AMREP.\* (Mandel, A. 810, 849, 852, 856). While the scripts varied somewhat, the basic theme of the sales presentation remained unchanged from 1965 forward.

Rio Rancho land was offered and sold as an "investment program", (GX 316; A. 10283; GX 314; A. 10249; GX 256; A. 10239-40; GX 671; A. 10548) and as an opportunity to "make a great deal of money". (GX 316; A. 10279, 10284). The primary inducement given to people to buy this land was as a financial investment. For example, one speaker's script says:

"The word investment incidentally brings me to the main reason for being here because what we are presenting here tonight, ladies and gentlemen, is a land investment program." (GX 316, p. 10; A. 10283).

The script goes on to say:

"... you can make a great deal of money, and that is what we are going to talk about here this evening: making a great deal of money—because I'm assuming that everybody likes to make money". (GX 316; A. 10279; see also GX 317, 10302-3).

Another presentation, a recording of which was in evidence, put it this way:

"It is not important that you live there or that you retire there, or even that you visit there. The only thing that's important is that you want to make money." (GX 671a; A. 10550).\*\*

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\* Copies of scripts, as well as tapes of actual sales dinners, were introduced in evidence. The jury only listened to one tape of a sales dinner (GX 671A) and utilized a transcript as an aid which is reproduced in the appendix at 10547-64.

\*\* Defendants Carity and Daniel Friedman's theory that anyone who bought one or two lots was buying for relocation and not as a financial investment, is sheer conjecture (Br. p. 23) and totally ignores the thrust of the sales presentation.

Moreover, the purchase of Rio Rancho lots was represented to be a safe investment, a "documented opportunity" to make money (GX 316; A. 10284; GX 314; A. 10249), in a "guaranteed and protected" program.\*

Sales presentations left no room for customers to construe the representations made by defendants as "mere opinions" rather than facts. Customers were repeatedly told "that facts, ladies and gentlemen are all that we are going to deal with here this evening." (GX 317; A. 10302; GX 316; A. 10278). Prospective customers were told that an investment in Rio Rancho lots was better than investing money in the stock market because with stocks "the element of risk is there". (GX 315; A. 10266; See also GX 475; A. 10450; GX 475A; A. 10452). Comparisons were made between the rate of return on other investments such as stocks, bonds, mutual funds, insurance and savings accounts and the rate of return on an investment in land.\*\*

Usually a chart or blackboard was used by the speaker to illustrate the rates of return on these various investments. (Davis, A. 2981). The rate of return on land was represented to be 25% per year and purchasers were led to believe that this was the rate of return that they could expect on a purchase of Rio Rancho land. (See, e.g.

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\* "You pick the amount that you are going to force yourself—you're going to *discipline* yourself to put away every month to work for yourself in as guaranteed and protected a program as you will ever find anywhere." (Emphasis in original; GX 317; A. 10323).

\*\* The following purchasers testified on this point: Hampe (A. 350, A. 417); Seder (A. 1550); Finnen (A. 1623-4); Greenberg (A. 1720-1); Jones (A. 1828); Brindle (A. 2528); Fox (A. 2821, A. 2860); Switt (A. 2894); Mols (A. 3934); Reyes-Guerra (A. 5939-40). In addition, salespeople for the Company confirmed that investment comparisons were a standard feature of the sales presentation; see, e.g., Mandel (A. 994-5); Bondy (A. 1438-9); Masone (A. 2111-2); Potter (A. 2458-9); Davis (A. 2981); Miller (A. 3016-7); and McCorkle (A. 3102).



Brindle, A. 2528). Purchasers were told that due to the principle of "financial leverage", that is, "using a small amount of money to control a large amount of money," (GX 671; A. 10561-62), they would be making 25% on the entire purchase price, not just the amount they had invested.\*

In addition to comparing a purchase of Rio Rancho lots with other kinds of investments the speaker referred the prospective customers to page 9 of a pamphlet entitled "This is My Land",\*

*"because on this page you are going to find the huge profits that have been made on the sale and re-sale of real estate in and about the city of Albuquerque over the past several years."* (Emphasis added; GX 314; A. 10246-47) (See GX 384; A. 10382).

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\* The Regional Sales manager described the rate of return as follows at a sales dinner, a recording of which was in evidence:

"...land in the metropolitan areas of Albuquerque has increased in value 25% a year for the past 20 years, and it is still increasing. And these are facts, ladies and gentlemen, they are written down on those fact sheets that you have. And ladies and gentlemen, just to give you an example of what I mean, if you were to have invested \$4,000 in a piece of this land 12 months ago, by now, 12 months later, because land has increased in value 25% there, your land will now have a gain of \$1,000 and the value would be \$5,000. Now, according to your allocation sheet, if you [unintelligible] put in \$50 a month approximately, there is an outlay on your money [sic] on your part of \$600 for a \$1,000 gain. Again, arithmetic, that's a 157% increase on your money. You know, it's almost as much interest as the banks give you. [Laughter]" (GX 671; A. 10562; See also GX 315; A.10269).

\*\* The pamphlet "This is My Land", was the principle brochure in use since 1966 (GX 384; A. 10374). It, like all other promotional material, was written and prepared in house at AMREP. (Mandel, A. 797, 828-29; Perlmutter, A. 3551-52).

Prospective buyers were led to believe that the examples in the pamphlet were illustrative of the kind of money they could expect to make by investing in Rio Rancho property. Page 9 of the pamphlet (GX 384; A. 10382) set forth the percent of profit per year on the sale of various pieces of real estate. In the examples given, the property had been held anywhere from 8 months (Example D) or one year (Examples E; G), to 5 years (Example A), 13 years (Example C) up to 26 years (Example F). Persons in attendance at the dinners were led to believe that the amount of money they would make really depended on how long they held onto the land. (See, e.g., GX 669; A. 10542-43).

The examples given in this pamphlet, however, were entirely misleading and in no way comparable to the Rio Rancho property offered for sale at the dinners. (Carruthers, A. 4637-41). For the most part the property set forth in the examples was located on Central Avenue in downtown Albuquerque (which happened to be Route 66), or was located on Coors Boulevard, also one of the main arteries for the City of Albuquerque. Likewise, the zoning for these properties was not comparable to the Rio Rancho property offered for sale. (Carruthers, A. 4637-41). Not only were the examples wholly misleading, but in one instance (Example C) property which was described as "a few blocks from Rio Rancho", was in fact more than five miles away. (Carruthers, A. 4639).

The testimony at trial established that people trusted the defendants (see, e.g., Finnerty, A. 2644-5; Jones, A. 1864). Naturally, disarmed prospective customers in attendance at the dinners were in no position

to question the veracity of defendants' attractive sales pitch, and indeed fell prey to defendants' considerable efforts to establish their "credibility" and reliability. (GX 316; A. 10284; GX 314; A. 10248; GX 317; A. 10294-95; GX 671; A. 10556). Thus, defendants pointed out that they were a publicly held corporation traded on the New York Stock Exchange; they represented not only that what they were saying was factual and truthful (GX 317; A. 10302 and A. 10323; GX 316; A. 10284; GX 314; A. 10249), but went so far as to create the belief that their representations with respect to the investment value of Rio Rancho had been verified as accurate by government regulatory agencies. (GX 671; A. 10559). In short, customers were led to believe that they were fully protected in purchasing Rio Rancho land. (GX 316; A. 10284).

Prospective customers were told that Rio Rancho lots were a wonderful financial investment. This claim was founded upon the representations that Rio Rancho Estates was located northwest of the City of Albuquerque, that Albuquerque was hemmed in on three sides, and was "bursting at the seams", and that Albuquerque could *only* grow to the northwest, to and through Rio Rancho Estates. For example one dinner-sales script stated:

"Albuquerque only happens to have one very serious problem, and that problem happens to be our advantage. Albuquerque is bursting at the seams. But the city is surrounded! Albuquerque's expansion is blocked on three sides by high mountain ranges and government reserved lands on which *they cannot build*. There is only one direction in which Albuquerque can expand . . . to the northwest, *and that is precisely where Rio Rancho Estates is located!*" (Emphasis in original; GX 316; A. 10280); (See also GX 317; A. 10304).



Similarly, another script used in 1965 proclaimed:

"Opportunity [is] knocking for you. Hemmed in on three sides, only one direction the city can grow. Right through Rio Rancho Estates." (GX 315; A. 10267).

Through such representations—which were factually unfounded—the deliberate impression was created that there would be a great demand and a profitable resale market for Rio Rancho lots. (GX 315; A. 10271).\*

As early as 1965, purchasers were told that the City had "pushed out as far as Paradise Hills" (GX 315; A. 10267), a subdivision which adjoined Rio Rancho on the south, and that Rio Rancho was next. To reinforce this message of unquestionable expansion "to and through Rio Rancho," a map, with arrows pointing to Rio Rancho as the next and necessary place for Albuquerque to grow, was given to prospective customers (GX 271; A. 10241). Moreover, a film entitled "West Side Story" was shown at the sales dinners. That film, described by the speaker as a documentary which was not produced by AMREP, portrayed Rio Rancho Estates as the dominating factor in the growth of Albuquerque. (GX 314; A. 10246). In fact, the principals of AMREP and Rio Rancho did have a role in production of the film.\*\*

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\* As early as 1965 customers were told that the city of Albuquerque "is now ready to come into Rio Rancho Estates" (GX 315; A. 10268) and thus their investment had resale value:

"Your investment has resale value. Because I tell you right now, 18 months from today you will not be able to buy it for less. Because we will have sold it all out. People like yourselves will be in the resale market." (GX 315; A. 10271).

\*\* The film was produced by the West Side Association, a group of realtors and developers of which AMREP's and Rio Rancho's principals were members and who played an active role in making the film. (GX 638; A. 10514).

Indeed, the defendants had drastically edited the film to highlight Rio Rancho by omitting segments depicting subdivisions located on the West Side of Albuquerque, closer to the City than Rio Rancho Estates and into which the City could grow. (GXs 69, 70).

Beside the central representation that Albuquerque could only grow to and through Rio Rancho Estates (McCorkle, A. 3102-03), thereby assuring purchasers the opportunity to make a great deal of money through profitable resale of these lots, purchasers also were led to believe that the defendants would improve the lots they were purchasing with water, utilities and paved roads, thus further enhancing resale value.\*

The compelling sales pitch was capped off during the late 1960's and early 1970's with the advice to customers that the property was almost sold out and that the company would soon be setting up a resale office to resell their lots,\*\* an inducement which was never carried out. (GX 128e; A. 10140 and GX 129(1); A. 10153).

In sum, the essence of the dinners was to convince those in attendance of the soundness and guaranteed financial returns represented by an investment in Rio Rancho.

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\* "[A]t Rio Rancho Estates it is not undeveloped realty it is pre-developed realty. Meaning we guarantee you streets and roads, a city water system, gas and electric, telephone, all of the necessities for a new and better way of life the way they are there today in the first unit." (GX 315; A. 10268).

\*\* Both customers and salespeople testified about the company opening a resale office. (See Henry A. 426-7 and A. 435-6; Seder A. 1554; Switt A. 2902; Gusowsky A. 3948 and A. 4026-7; Bondy A. 1448; Lederman A. 1983-4; Masone A. 2145; Davis A. 2978; Miller A. 3014).

## 2. The Selling Techniques and Recruitment

High pressured selling techniques were an integral part of the scheme. The operating premise was that a certain amount of "mass psychology" was needed to make the sale. (Perlmutter A. 3323). Salespeople had to assure that there was a minimum number of people in attendance at a party (GX 749; A. 10571) to enable them to create a carefully contrived air of enthusiasm and to generate the sense of urgency necessary to facilitate the sale. (GX 531; A. 10473).

Training of sales personnel emphasized set techniques to create enthusiasm and to generate excitement. A tape of a sales training session recounts many of these techniques. (GX 669; A. 10525-46). Salespeople were trained to applaud the speaker (GX 669; A. 10526) and, at the point when the speaker finished his presentation with reference to an "allocation sheet" of lots available for sale that evening, salespeople were trained to jump up and call a "hold" on a piece of property, regardless of whether a customer had committed himself to buy the property.\* (GX 669; A. 10536; GX 752A; A. 10581; 10590, 10593). This was done to create a sense of urgency in order to get people to buy that evening.\*\*

Typical of this training emphasis was the critique of a sales dinner by Daniel Friedman, AMREP's Vice-President of Sales, who instructed the sales manager:

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\* A training manual instructed salespeople to:

"CALL OUT A 'HOLD'

Help create excitement.

Build it up to a real sales climax" (GX 752A; A. 10593)

\*\* Otto Steve Bondy, a salesman for the company, testified that the use of the "holds" technique was designed "to get the people enthusiastic by creating an urgency . . ." and to "stimulate the sales." (A. 1428-29).



"Please work with your sales people in creating a little more activity, enthusiasm and noise especially when holds are called." (GX 531; A. 10473).

After calling out a "hold" salesmen were trained to begin filling out the sales contract immediately—again, regardless of whether or not the customer had committed himself to buy—(GX 669; A. 10533-39; GX 752A; A. 10590), with the obvious purpose to pressure people to sign the contract that night. Sales personnel were armed with answers to overcome every conceivable objection to buying land that night (GX 669; A. 10542-44; GX 752A; A. 10590), including telling people that by signing the contract they were merely "reserving" property and that they were not making a final decision because they had six months within which to change their mind, cancel and receive a full refund. (GX 316; A. 10290). However, a refund of investment was contingent upon the purchaser visiting the property at his own expense, a condition which many did not understand. (see e.g., Jones, A. 1864).\*

A salesman was given only ten minutes to "close" a customer after a "hold" was called (GX 752A; A. 10594; A. 1343). Salespeople were trained to move into the "close" by directing a customer's thinking toward investment, because "Investment is always THE CLOSER." (GX 752A; A. 10589; see also Lederman A. 1937-38). In the event that the salesman was unable to close the sale within ten minutes, the organized sales practice was for him to signal to a "T.O."; i.e., a "takeover" man (GX 752A; A. 10594; McCorkle

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\* A script for a follow-up call the day after the sale was made states:

"(If HSO's state that they were unaware that they had to go to the property). Gee, I'm sure your consultant made that point clear—but, you were intending to make the trip before May or June, weren't you?

(If no—sell idea of flight)" (GX 203A; A. 10233).

A. 3107-3108). This would be another salesperson or manager who would then also try to "close" the sale.\* This was accomplished by drawing out and responding with prepared answers to the prospect's objections. (Lederman A. 1956; Zaknich A. 1343; McCorkle A. 3108; GX 669; A. 10542-14). At times there was more than one "T.O." (McCorkle A. 3108). This was pure hard-sell, for the operating premise was that if the customer did not sign the contract that night the sale was lost. (Lederman A. 1937).

The defendants placed tremendous pressure on personnel to close sales or be fired. (GXs 358-363; A. 10341-73; Perlmutter A. 3567). In recruiting sales people, emphasis was placed on hiring "tigers" who could "close" a sale and to pass up the "nice guys" who finish last; to fire a "nice guy" and to work instead "on developing a new tiger who will get those buying units to do what they're supposed to—buy." (GX 752Z; A. 10604).

The "tigers" whom defendants sought to recruit were best exemplified by Sid Hollander, a regional sales manager. When sales fell off in an office, Hollander was sent out to train and motivate the salespeople. (Mandel A. 992). Hollander, in a taped recording of a training session, described defendants' approach to a sales dinner with an analogy to the Green Bay Packers:

"And to go back to the Green Bay Packers for just a moment, if I may. We have in this room two, three, four, five, six, seven, eight, nine. Get two more people and I'll set up . . . Well, no. Three more cause I'm not gonna play, and I'll

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\* Daniel Friedman, in critiqueing a sales office, warned the sales manager that "your salesmen generally did not T.O. quickly enough. I noted that by the time a T.O. took place, it generally was an 'after-the-fact' situation and much too late." (GX 531; A. 10473).

set up a match for you with the Green Bay Packers tomorrow or next week. Fair enough? Would you get into a line today with the Green Bay Packers?

[Audience conversation]

Do you know why you won't?

[Voice] You'll get killed.

[Hollander] Now, let's talk about C & A Realty.\*

These people who come to our party as versus you against the Green Bay Packers. We serve them with an organized offense against a disorganized defense. We could kill them. We could walk all over them, and we do, and we do . . ."  
(GX 669; A. 10545).

The evidence at trial confirmed the accuracy of this analogy.

### 3. Follow Up After the Sale

On completion of the sale—marked by the signing of the contract—a purchaser was given a package of materials, which included promotional material, a copy of the contract, and sometimes an offering statement and property report. The next morning, the salesman called the purchaser and, following training instructions, congratulated him on the investment. The true purpose of the call was to head off the morning-after "buyer's remorse" by assuring the purchaser that he had made a sound and fruitful investment. (GX 669; A. 10532; GX 203A; A. 10229). Again, defendants made use of a

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\* C & A Realty was the broker for Rio Rancho lots in Denver, Colorado.



script\* for this so-called "confirmation call", leaving nothing to the imagination of the individual salesman. (See GX 468; A. 10448-49). A form letter also was sent to the purchaser, usually the day after the sale, commending the decision to "reserve" property at Rio Rancho as probably the "wisest most important investment" he had ever made. (GX 750; A. 10575).

Purchasers, who were called in shorthand "HSO's" ("homesite owners"), then were systematically invited back to other sales dinners in an attempt to sell them additional property, a practice known as "loading." (Mandel, A. 1030-31; Perlmutter, A. 3440). At a follow-up sales dinner, the purchaser was told how much his previous investment had increased in value and was encouraged to buy additional property. The critical selling point for additional purchases was a deliberate effort to create the belief that the sales prices for lots set by defendants were equivalent to the lots' resale value, and that increases in the prices reflected increases in the resale or investment value of the customer's previous purchase. (Mandel, A. 1119 and A. 923-25). Letters were sent to "HSO's" advising them of impending price increases, the attendant increased value of their land, and urging them to buy additional property.\*\*

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\* The script as of December, 1973, had a portion designated "investment understanding" and stated:

"You and your husband have no immediate plans to move to New Mexico? Have you? I see, then *your* property will be for investment. That's what most of our homesite owners have in mind. Many times, however, once they see the property, they fall in love with it, and the next thing you know—we've got a new resident. Are there any points about the investment factor which are unclear to you? (Clarify any misunderstanding)." (GX 203A; A. 10233).

\*\* "Dear Homesite Owner:

GOOD NEWS—10% PRICE INCREASE. Today we received a telegram informing us of a GUARANTEED

[Footnote continued on following page]

The practice of "loading" was very successful. Defendants set no limit on the amount of property which could be sold to a customer.\* (Permuter, A. 3441).<sup>\*</sup> The success of the follow-up procedure was shown by Government witnesses who testified that they went to several dinners and, having been told about the price increases, believed that their land had increased in value and, therefore, purchased more.\*\*

In fact, the price increases did not reflect any increased value to the lots purchased by "HSO's". Instead, the price increases reflected only increased profits to the company. In a speech to the New York Society of Security Analysts, defendant Howard Friedman made this point crystal clear:

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PRICE INCREASE. Rio Rancho Estates is selling at a far more rapid rate than was anticipated, and the availability of land is speedily diminishing. The valuable property you acquired at Rio Rancho Estates *is about to become MORE valuable*. Yes, we have been notified that selling prices will be raised effective December 22, 1973.

Some of you have seen your property double in price, and some have even seen it triple since your original purchase.

Now that we are on the threshold of another increase, we felt it only fair to tell you in enough time for you to examine your finances. You may want to acquire more property at today's prices, knowing with absolute certainty that the price per acre **WILL BE RAISED BY A FULL 10%.** \* \* \* (Emphasis added). (GX 128(f); A. 10144)

While HSO special sales' dinners were generally successful, the sales at these dinners always increased prior to price increases previously announced by letters such as GX 128(f).

\* However, sales personnel were instructed to pursue a credit check if purchases totalled in excess of \$20,000. (GX 203; A. 10223-24).

\*\* Gustav Mols who bought property for a total sales price of \$30,000 testified he thought he was a rich man as a result of what he was told about the increased value of his property at subsequent sales dinners he attended. (A. 3857, A. 3866, A. 3908, A. 3912-13. See also e.g. Jones A. 1833-5; Finnerty 2653-6.)

"The increase of our prices has not been offset by any increase in cost of product, because, as you know, our land and development costs are fixed.\* The more successful we are in sales and development, the higher our sales prices will go. This means that our gross profits should continue to increase as long as selling prices can be increased." (Footnote added; GX 549; A. 10492).

Lots were sold by installment contracts, usually requiring payments for 93 months. (Perlmutter A. 3302). When purchasers fell behind in payments, "lulling" letters were sent advising them that their land had increased in value (GX 123(f); A. 10136; GX 146J; A. 10170; GX 107j; A. 10131; GX 167i; A. 10220), and urging them to continue to make payments on their property so that they might realize a "profit" on their investment. (GX 122(l); A. 10135; GX 167(i); A. 10220-21). Moreover, the purchase contracts provided that if a purchaser defaulted all money would be forfeited to the company. (GX 161(a); A. 10208).\*\*

#### 4. The Tour and Refund Provisions

A purchaser could cancel a contract within six months and get a refund if, and *only if*, he visited the property

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\* The development costs for the lots sold nationally were fixed because defendants did not intend to do anything further to them. That land was raw land improved only by dirt roads as referred to in the S.E.C. report filed in 1962. (GX 400B; A. 10402).

\*\* Howard Friedman, in a speech in 1970, described the forfeiture provision as follows:

"[W]e do not transfer title to the purchaser until the final payment has been made. Although we try to reduce cancellations, if the customer fails to make payments, we merely cancel his account, retaining his past payments and sell the product all over again." (GX 560; A. 10503).



on a company-guided tour at his own expense.\* This six month refund provision was an extremely important inducement to get people to sign contracts at the sales dinner, because customers believed they were not making a final decision. The tours, however, were used to discourage purchasers from cancelling their contracts, (a process called "solidifying") and more importantly to sell additional land ("upgrading"). (GX 767; A. 10633; Bondy, A. 1459; Masone, A. 2159; Monaco, A. 2333 and A. 2370). In this latter respect, the tours were enormously successful. For example, on one tour a quarter of a million dollars in sales were completed. (GX 767; A. 10633).\*

Tours were organized and scheduled in such a way as to control the visitor's movements. Land owners were transported in groups on company buses, and were given little free time. (See, e.g., DeWitt, A. 2250-3; Finnen, A. 1630-2; Bondy, A. 1462 and A. 1470; Lederman, A. 2074; Masone, A. 2155). They were wine, dined and given the same hard sell punctuated by the same false and misleading representations about investment value of the land and the growth of Albuquerque. (Finnen, A. 1632; Masone, A. 2158-9; DeWitt, A. 2256; Gray, A. 5804-5). Inquiries about the vast stretches of vacant land around Albuquerque were answered by the response that the land could not be built upon. (See, e.g., Bondy, A. 1464-5; Gray, A. 5803-4). Purchasers still had confidence in the defendants. They were sold—and stayed sold—until they tried to resell.

When on tour purchasers were shown the "building areas" at Rio Rancho, and when shown the property

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\* While defendants did underwrite the ground accommodations for approximately \$50 to \$100, the profits to them from "solidified" sales and "upgrades" more than compensated for this expenditure. (See, GX 767; A. 10633).

they had bought, were told that the defendants soon would similarly improve that property. In short, those who visited Rio Rancho on company-guided tours were not given the necessary and relevant information and thus were in no better position to evaluate the investment potential of Rio Rancho lots than those who had merely purchased at the sales dinners.

#### **D. The "Exchange Privilege" and the Community at Rio Rancho.**

While Rio Rancho lots primarily were sold as a financial investment (See e.g. GX 671; A. 10550), the defendants knew that a small percentage of purchasers, which they believed to be 5% or less,\* would actually move to the property. (Avellanet, A. 4819-20 and A. 5037; GX 66; A. 10101). The defendants also knew that the demand for homes at Rio Rancho from the local Albuquerque market was nil.\*\* (GX 657; A. 10521; GX 66; A. 10666; 10108; Avellanet, A. 5021-26). In fact, although approximately 77,000 lots had been sold (GX 855; A. 10664) over a 15-year period to 45,000 purchasers, only about 1,800 lots in the "building areas" had been built upon, (GX 1002; A. 10734) representing less than 5% of the purchasers, less than 3% of the lots

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\* The defendants expected that perhaps as many as 25 percent of purchasers would *think* they would relocate but in fact only 5 percent actually would relocate. (Avellanet A. 4819-20; GX 66; A. 10101; *see also* Carity-Friedman Br. p. 24).

\*\* John Kearney, a defense witness, and the volunteer fire chief at Rio Rancho, testified that he kept records of Rio Rancho residents since 1967 and that in 10 years only 50 families moved from Bernalillo County, which is where the City of Albuquerque is located. Of those 50 families, he was unable to say whether any were homesite owners who had relocated temporarily to Bernalillo county while waiting for a home at Rio Rancho to be completed. (A. 6400-6402).

sold, and less than 2% of the lots offered for sale. (GX 1002 p. 2; A. 10724).

To accommodate the 5% or less who wanted to move to Rio Rancho Estates,\* the defendants set up a so-called "exchange privilege," which they greatly touted as a fall-back, safety provision.\*\* A small amount of land—which was not offered for sale on the national market—was set aside, and utilities were placed in this company-owned land as demand warranted. This land was called a "building area" or a "core" area,\*\*\* and the small percentage of purchasers who wished to build a home were permitted to "exchange" a single half acre "homesite" lot for a lot in the "building area," although usually at an added cost of \$1,500 or more (GX 898;

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\* The purchasers called by the defendants at the trial—who counsel for defendants incorrectly argued were representative of the purchasers of Rio Rancho land—were all residents of Rio Rancho and therefore part of the 5% defendants had expected to move to Rio Rancho Estates. The jury correctly found that the primary inducement for purchasing Rio Rancho land was as a financial investment for resale at a profit, and not to relocate to Rio Rancho as the defendants unsuccessfully contended.

\*\* The "exchange privilege" clause in the contract of sale for "homesites" read as follows:

"[i]f when Buyer is ready to build a home, utilities have not yet reached his site, seller will exchange a comparable building lot in an area already served by utilities for a single lot of Buyer." (GX 126(a); A. 10138).

\*\*\* Defendants Carity and Daniel Friedman incorrectly state that "units" were set aside (Br. p. 4). In fact the core areas or building areas were located within units but did not comprise the entire unit. For example, there were core building areas within Units 16, 11 and 7 but these core building areas only comprised a small percent of land in those units. The land outside the core building areas in Units 16 and 11 have been sold off nationally and do not have utilities.



A. 10669; GX 908), and with the lot owner getting a smaller lot in the building area—usually a quarter acre.\*

There was a further serious catch to the exchange provision, rarely made clear to the prospective buyer. If a purchaser who wanted to build a home owned more than one "homesite" lot he had to retain the additional lots. Only one "homesite" lot could be exchanged for a lot in the "building area" for each home built. Thus, if a purchaser bought two acres, i.e., four "homesites" lots, he would have to build *four homes* in order to entitle him to exercise the "exchange privilege" and get four lots with utilities. Of course, however, no one was able to build on the actual "homesites" they purchased because all lots out of the "core" area were without utilities. While purchasers were aware that the lots they were buying did not have utilities, all nonetheless were led to believe that the defendants would provide utilities in the near future, since it was alleged that development was rapidly taking place and soon would get to each individual's land holdings.\*\*

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\* There were so-called "even" exchanges offered. A purchaser could exchange a one-half acre "homesite" lot for a one-half-acre "building" lot. However, the half-acre building lots did not have curbs, gutters nor were they fronted by paved roads. Moreover, these "even" exchange areas which were in Units 7 and 11, were several miles from the other building areas and the access roads were not paved at the time of the indictment. (Perlmutter A. 3708-09). Unit 16, the first building area, was an "even exchange" area with paved roads. Lots in that small building area had been almost entirely exhausted by the early 1970's. Furthermore, the evidence established that people were discouraged from exchanging into the "even" exchange areas. (GX 893(a); A. 10668). Again any additional lots had to be retained.

\*\* The defendants' lack of intention to fully develop Rio Rancho is poignantly set forth in Chester Carity's handwritten comments on a memo in July of 1971 from the project director at Rio Rancho, Hugh Hood, who suggested to Carity that they

[Footnote continued on following page]

The "exchange privilege" thus was highly misleading to all purchasers. For those who bought intending to relocate, their belief that they would be able to build on the "homesites" they were purchasing, (*See e.g.* Davis, A. 2592-93), while encouraged by defendants, was in fact misguided. Similarly, those who bought lots as a financial investment believed that defendants would provide utilities to the lots they were purchasing, thereby enhancing resale value. While the purchase price for all lots sold nationally was represented to include utilities and defendants led purchasers to believe that they would fully develop all of Rio Rancho, in fact defendants never intended or believed that the 91,000 acres of Rio Rancho would be fully or even substantially developed.\*

Indeed, after more than 15 years, less than 5% of the land has been developed. (GX 1075A). Again, the supposed protection of the "exchange privilege," insofar as it would enable a "homesite" owner to exchange for property in this small zone where utilities had been provided, was no protection at all since no one could make use of more than one lot in the core area without building multiple homes.\*\* Moreover, there was *no* "exchange privilege"

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set forth in a newspaper what "commitments" the company has toward Rio Rancho Estates. Chester Carity, the Chief Executive Officer responds: "Ye Gods No. Never use that word. All they want is to pin us down"—and "cannot commit anything!" (GX 498; A. 10454).

\* Ralph Avellanet, the author of the planning report commissioned by AMREP in 1965 testified that it was never defendants' intention to develop more than the 5% of Rio Rancho property. Indeed, his study was commissioned on the explicit theory that only 5% of the purchasers would relocate to Rio Rancho. (A. 5036-37).

\*\* As of April, 1975, 44% of Rio Rancho customers had purchased more than one lot, which accounted for 65% of total sales amount. (GX 887). It is difficult to grasp the solace which defendants Carity and Daniel Friedman take from pointing out to the Court that *only* 27% purchased two residential lots. (Br. p. 9).

for commercial and multi-dwelling lots and ranchettes all of which were located outside of the "core" building areas.\* Thus, the value of these lots was wholly dependent upon development reaching them.\*\*

Because the defendants knew the demand for homes, and thus building lots, would be limited, i.e. only 5% from the national market and next to nothing from the local market, (GX 657; A. 1052; GX 66; A. 10101), they did not set aside enough land to allow each "homesite" lot sold to be exchanged for a lot in a building area which had access to utilities. (GX 885; A. 10664-65). Moreover, when "homesite" lots were exchanged for a lot in the building area the "homesite" lot went back into inventory and was resold.\*\*\* (Perlmutter, A. 3685-86; Zarnick, A. 1267-68). Indeed when inventory was tight,

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\* All of the defendants have carefully avoided discussing the lack of any "exchange privilege" for commercial and multi-dwelling lots and ranchettes and the consequences which flowed from it for purchasers who invested thousands and thousands of dollars in these lots and ranchettes. (E.g. Henry, \$28,000; Gusowsky, \$21,000; Morden, \$14,000; Finnen, \$10,000; Reyes-Guerra, \$7,000; Davis, \$6,000; Bonavisa, \$6,700).

\*\* AMREP's highest projection for home-building was 350 to 400 per year (GX 963; A. 10677), although they never built that many homes in any one year. Rio Rancho had provided Al Pierce of the Council of Governments with population projections to 1980 of about 700 or 800 people per year which is about 200 to 250 dwelling units per year. (A. 4436-37). Since there were approximately 86,000 lots offered for sale nationally (GX 795 p. 3) at that rate, it would take more than 200 years to fully develop Rio Rancho.

\*\*\* A film entitled "Your Golden Future" was shown at the sales dinners. The film featured the "building areas" and represented them as a prototype of what defendants intended to do to the land that they were selling nationally as financial investments. Since the vast amount of lots were in fact to remain barren and undeveloped, the picture of this "model" community was highly misleading, as is defendants' description in their briefs of the Rio Rancho community as it exists today, when compared with the property as a whole.



lost set aside for future areas were released for sale nationally. (GX 931; A. 10674; GX 917; A. 10670; GX 919; A. 10673).

Contrary to what purchasers were led to believe, "homesite" owners, in fact, only were buying the right to exchange *one* "homesite" lot for a building lot when and if they were ready to build a home. By defendants' own calculations, 95% of purchasers, who bought the lots as a financial investment and did not want to build a home, were unable to get a lot with utilities, notwithstanding the fact that they were charged for utilities in the purchase price.\*

Finally, purchasers of commercial, multi-dwelling lots and ranchettes, who had *no* right to exchange their lots for lots with utilities,\*\* (GX 203; 10227) believed, as did

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\* Defendants' intention to place utilities only in their own company-owned land, i.e., the "building areas," and not in lots outside of the company-owned building areas which were offered for sale nationally (GX 400B p. 13; A. 10402), was made apparent in the New York Offering Statement after December 5, 1969:

"The possibility exists that at the time a purchaser is entitled and wishes to make such an exchange there will be no lots in the improved area(s) available for exchange. In such event a purchaser may retain the lot he purchased or tender its return to the Company and receive a refund of all monies paid. Refunds will be contingent upon the Company's ability to repay." (DX, CK; A. 10814).

Thus, when the lots in the building areas were exhausted the "exchange privilege" collapsed. Defendants Carity and Friedman erroneously state in their brief that the Government never challenged the validity of the exchange right. (Br. p. 9).

\*\* Defendants Carity and Daniel Friedman incorrectly state in their brief at page 4 that the "exchange privilege gave *every* purchaser immediate access to water and utilities whenever a decision to move was made." (Emphasis added). Of course this statement also makes the fallacious assumption that every purchaser bought with the intention of moving. These defendants also incorrectly argue that the adequacy of water and other necessities was assured. (Br. p. 2). (See GX 1002, pp. 8-11; A. 10730-34).

"homesite" owners, that defendants would extend utilities to their lots. Purchasers of commercial and multi-dwelling lots made their purchases as a financial investment, based upon representations that such lots would be surrounded by developed areas and that retail commercial establishments and multi-family dwellings then could be erected on those lots which would be income producing, or alternatively, that the lots could be resold at substantial profits for that purpose. (See, e.g., Henry, A. 435; Finnen, 1635 and 1647; Greenberg, 1733-4; Davis, 2558; Mohammed, 2610 and 2628-9; Bonavisa, 2759; Mols, 3851-2; Gray, 5805-6; and Reyes-Guerra, 5878).

In most cases the commercial, multi-dwelling lots and ranchettes were miles from utilities, and were some of the most expensive lots sold.\* (GX 795 p. 5). In addition, it was company policy that a purchaser had to buy a minimum of *two* commercial lots. (See e.g. GX 1304; A. 10795). Since the defendants did not intend to develop the entire property—knowing full well there would never be enough demand—and did not intend to extend utilities beyond their own building areas, the sale of commercial and multi-dwelling lots as a safe financial investment was a total hoax.

### **E. The Facts About Albuquerque and its Growth**

As set forth above, one of the main reasons given why Rio Rancho land was a safe financial investment

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\* For example, Morris Gusowsky, a resident of Rio Rancho, purchased a ten acre ranchette for a price of \$21,400 (GX 110(j)), and had total purchases of \$45,000. (See GX 110a-j). When he built his home at Rio Rancho he was unable to build on his ten acre ranchette and was able to exchange only one half-acre homesite lot for his building lot which is a third-acre. Moreover, he was required to pay an additional \$1400 for his lot in the building area. Mr. Gusowsky is 63 years old and has been unable to sell any of his remaining property which he purchased as an investment.

was that Albuquerque was "bursting at the seams," was hemmed in on three sides and could only grow to the northwest to and through Rio Rancho Estates. (McCorkle, A. 3102-03). These claims were made from the inception of the sales dinners in 1965. In fact, however, Albuquerque was not, and had not been, at any time "bursting at the seams," nor was Rio Rancho the only available land into which the city could grow. In short, Albuquerque was not dependent upon Rio Rancho for its future growth. The evidence at trial was uncontradicted that most of Albuquerque's growth was to the northeast over the 15 years that the defendants were selling land, see *infra* at pp. 48-52. Moreover, there was abundant vacant land to the west and northwest of Albuquerque within Bernalillo County into which the city could grow without ever reaching Rio Rancho Estates. (DX EK; A. 10862-92; DX EL; A. 10893-906).

The defendants were aware of these facts. In 1964 the Planning Department for the City of Albuquerque published a report called the "1985 Land Use Plan", (GX 60; A. 9980-10060), which was in the defendants' possession (A. 4508-9; A. 7451). The study area for that report included parts of Bernalillo County, where the city of Albuquerque is situated, but did *not* include Rio Rancho Estates which is in Sandoval County.\* The report contained the following findings:

"There are large areas of vacant land in every quadrant of the city, with most of it potentially developable for urban use. *There is sufficient developable vacant land within the study area to accommodate a population of more than 2 million.*"\*\* (A. 10010) (Emphasis supplied). (See also DX EJ; A. 10860-61).

\* \* \* \* \*

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\* The study area is outlined in green on GX 1075A, an aerial photo mosaic. It does include the village of Corrales which lies within Sandoval County.

\*\* Albuquerque's population in 1964 was approximately 250,000.



*"Albuquerque has an abundance of vacant land available for urban development. Even the most optimistic growth projections would not utilize this land within the current century." (A. 10018) (Emphasis supplied).*

\* \* \* \* \*

The West Side, including the South Valley, will start to develop extensively.\* Because of the lack of present development, the West side can be expected to become the fastest growing area of the city on a percentage basis, although the Northeast Heights will continue to have the most absolute growth. (A. 9989).\*\*

Furthermore, in 1965 the defendants hired a consulting firm to do a market study. In preliminary findings submitted in November, 1965, the firm advised the defendants ~~that~~ even if Albuquerque's population doubled to 600,000 in the next 20 years the growth patterns would continue to be to the northeast and southeast areas of

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\* It was the government's contention that extensive growth could take place to the west and northwest of Albuquerque within Bernalillo County without any beneficial effect to Rio Rancho Estates. In their promotional material and sales presentations defendants always equated any growth to the northwest as necessarily being to and through Rio Rancho. No mention was made of the vast areas in the northwest quadrant of Bernalillo County into which the city could grow. Indeed defendants specifically edited-out references to these areas, save one, in the film "West Side Story", which was shown at sales dinners.

\*\* The report also stated:

"The projected population of 825,000 for the study area was distributed to the four quadrants, then to the districts. (A. 10025).

\* \* \* \* \*

Most of the districts were found to have more capacity than there were people that could be expected to fill them." (A. 10025).

the city with only nominal land shortages, and thus there would not be substantial development on the west side of Albuquerque.\*

Thereafter, in May, 1966, the firm submitted its final report, again concluding that notwithstanding a doubling of Albuquerque's population over the next 20 years there was ample undeveloped land closer to the city than Rio Rancho land, such that only a small and selective local market for Rio Rancho land was likely over the next 20 years.\*\* Moreover, this small and selective market would be for Rio Rancho land east of Highway 528 (See GX 93) which was not offered for sale nationally. (Avellanet, A. 4803-4).

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\* The preliminary findings were:

"1. Despite an expected doubling of Albuquerque's population to over 600,000 persons over the next 20 years, only nominal land shortages are expected to appear in the fast-growing Northeast and Southeast areas of the City and present growth patterns are expected to continue.

2. Factors of employment, commercial, and social establishment concentration in East Albuquerque will continue to preclude substantial development of West Albuquerque, despite bridge access improvements." (GX 978; A. 10687).

\*\* The final report concluded:

"Despite the expected doubling of Albuquerque's population over the next 20 years to over 600,000 residents, ample undeveloped suburban land exists more proximate to the City and its desirable parts than Rio Rancho's land, such that only a small and selective local market penetration by Rio Rancho is likely over the 20 year period from 1966 to 1985." (GX 66, p. 40; A. 10108).

The planning firm pointed out to defendants that the population figures in excess of 800,000 used by the City Planning Department were high because they were concerned with planning for adequate public transportation improvements for use even beyond 1985. (GX 66 p. 11; A. 10077). *See also*, Carruthers; A. 4504-5).

Notwithstanding the consulting firm's report and the Planning Department's 1985 Land Use Plan to the contrary, defendants' sales representations remained unchanged to at least 1974, when the grand jury investigation commenced.

## **F. Lack of a Resale Market**

An integral part of defendants' sales program was the representation that purchasers would find a substantial local resale market in Albuquerque in which their land investment would be converted into handsome profits. In fact, the evidence at trial—in the form of defendants' own admissions, the testimony of frustrated customers and of local Albuquerque realtors—convincingly demonstrated that there was no local resale market in Albuquerque over the entire 15 year period that defendants were selling property.

From as early as 1968, defendants blatantly contradicted their own sales claim of a quick resale market. In response to inquiry letters from property owners, AMREP advised: "listing your property with local brokers at the present time is premature, for it is still early for a local resale market to have developed." (GX 655; A. 10519; GX 149h; A. 10203; GX 645; A. 10515; GX 652; A. 10517; GX 158e; A. 10206; *see also* GX 1310(c); A. 10800; *see also* the following exhibits of SEC filings: GX 410 p. 8; A. 10420; GX 409 p. 9; A. 10415; GX 413 p. 4; A. 10424; GX 415; A. 10428 wherein the defendants assert that "Customers find it difficult to resell homesites.")

Numerous customers testified to their vigorous but unsuccessful efforts to resell Rio Rancho lots. *See infra*, at pp. 60-61. Customers, of course, were looking to the Albuquerque market to resell their lots because the defendants continuously represented at sales dinners that



there would be a demand for lots in Albuquerque. However, upon inquiry to the company as to how to go about reselling the property, customers were advised by the defendants, year after year, that there was no local market in Albuquerque, to try to resell their lots by advertising in their home town paper, or to try to sell the land to a relative or friend.\*

Ronald Williams, an assistant to the Executive Director of the Albuquerque Board of Realtors from 1967 to 1976, testified that from 1971 to 1973 the Multiple Listing Service of the Board of Realtors received from one to three inquiries a day from Rio Rancho purchasers who wanted to resell their property. (A. 5230). Williams explained that the number of inquiries increased to about five a day by late 1973 (A. 5231) and that the Board of Realtors, at the request of its members—whose number included Rio Rancho Estates from as early as 1968—drafted a form letter in 1974 to be sent to Rio Rancho purchasers inquiring about resale of their property:

“For your information, the Albuquerque Board of Realtors, Multiple Listing Service records reflect that there is *little, if any, local market for resales* of tracts in this particular subdivision. The Multiple Listing Service records reflect that during the past three years they have received ap-

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\* Defendants lamely pointed to a couple of resales of lots by customers which the evidence indicated was luck rather than proof of any resale market. See e.g. Mols; A. 3846-7). Similarly, defendants' reference to Mrs. Bonavisa, who testified that her husband had arranged to sell one of their lots to a co-worker in New York but that the sale was not completed because of the indictment, is much beside the point. Obviously, this arrangement was in no way probative of a resale market, particularly one in Albuquerque, and defendants' emphasis of this testimony points to the length to which they had to go to show even remote possibilities of resale.

proximately 690 listings of properties within the area and that there have been approximately 20 sales of listed properties.

In view of the above information, we do not have an interest in listing this property for sale." (Emphasis added; GX 817B; A. 10661; *See also* GX 817(a), A. 10660; GX 817(c); A. 10662).\*

In August, 1975 an auction of Rio Rancho lots was held in Albuquerque. The auction was sponsored by the Rocky Mountain Land Auction Company. Lot owners who wished to resell were solicited to list their property for a fee of \$15. (Clymer A. 5383; Kaufman A. 5325). Peter Olguin, the auctioneer, testified that 2,156 lots were listed for sale at the auction (A. 5146) but only 33 lots sold, at an average price of \$500 per lot.\*\* (A. 5151).

In the face of overwhelming evidence of the lack of a local resale market, defendants tried to argue that the lots were not sold for "quick" resale, a claim that was clearly contradictory of all of Rio Rancho's written and verbal sales representations. Lots had been sold for a period of 15 years and purchasers were continually led to believe that they would be able to resell their lots within a short period of time. As far back as 1965 the speakers script said, "Your investment has resale value". (GX 315 p. 14; A. 10271) and, "you always have a marketable product." (GX 315 p. 9; A. 10266). While that particular script was only used for a few months the message conveyed did not change thereafter. Thus,

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\* Purchasers' difficulties in even listing their property, much less reselling it, was the case prior to 1974 as well. (*See e.g.* Greenberg A. 1755).

\*\* Defendants unsuccessfully tried to establish that the auction represented a "distress sale" situation because of adverse publicity. However, the testimony of Mr. Olguin contradicted that theory. (A. 5164).

a memo in November, 1971, from Mary Ann Newman, the Director of Customer Relations at Rio Rancho, clearly established that customers were encouraged to believe that they could resell their land within a short period of time:

"Mr. Kapp called very upset over the fact they could not make the payments in the amount of \$298 and asked that we do something inasmuch as we are responsible for their particular predicament by advising them when they first purchased that the original 55,000 acres owned by Rio was soon to be sold out and there would be no more property available.

Shortly after their purchase, we announced the acquisition of 33,000 acres which circumvented their being able to sell their *property within the year's time as we had indicated they could do.*" (GX 872; A. 10663) (Emphasis added).

Moreover, customers were told that defendants would resell these lots for them at a profit within a short time. In the late 1960's and early 1970's many customers were told that the land was almost sold out and that the company would soon be setting up a resale office. For example, Adam Sporzynski, who lived in Ohio and who purchased land totalling over \$30,000, testified that he had been told several times at various dinners that a resale office would be set up.\* When Dr. Sporzynski wrote to Rio Rancho Estates inquiring about the resale office, he received a response from the company that, "We have not yet formed a resale department here at Rio Rancho Estates." (GX 129(1); A. 10153; See also GX 128(e); A. 10140). Other customers were likewise told that a resale office would be established.

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\* First he was told that a resale office would be set up in December of 1969, and later that it would be in April of 1970. (A. 5490).



(See e.g., Henry, A. 426-27; 431; 435-36; Seder, A. 1554; Switt, A. 2902; Gusowski, 3948; 4026-27). Indeed, representations that a resale office would be set up were made consistently at sales dinners and on the tours conducted by Leonard Geller and Peter Miller, who were general managers of defendant ATC.\* According to former employees who testified, representations concerning the resale office were made systematically to customers from the late 1960's to the early 1970's. (Bondy; A. 1448; Lederman; A. 1983-84; Miller; A. 3014; Masone; A. 2113 and A. 2145; Davis; A. 2978). Moreover, sales managers from different parts of the country, who were sent to ATC to be trained by Leonard Geller and Peter Miller, were advised by Geller that a resale office would be set up within two years. (Lederman; A. 1984).

But, despite their representations \*\* to the contrary, defendants never set up a resale office. Instead, when the initial 54,000 acres was almost sold out they acquired an additional 37,000 contiguous acres of land between August, 1969 and January, 1971, which expanded Rio Rancho from 54,000 acres to more than 91,000 acres. All but 2,500 of the additional 37,000 acres were purchased from the King Brothers Ranch at an average price of \$180 per acre.

In the early 1970's the defendants also considered buying a parcel of state land, totalling approximately 3,500 acres and which was within the boundaries of Rio Rancho Estates. (See GX 93). Defendants, however, were unwilling to pay as much as \$235 per acre for this land. Thus, in January, 1971, Solomon H.

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\* ATC was the most successful sales office.

\*\* Rio Rancho Estates, in response to inquiries from people concerning the resale office, reaffirmed these representations by sending out form letters advising them that there was no resale office "yet" or "at the present time". (GX 129(1); A. 10153; GX 128(e); A. 10140; See also GX 1034; A. 10774A).

Friend, Vice President and General Counsel of AMREP, sent a memo to Carity and Howard and Daniel Friedman which said:

"I then met with Victor Salazar concerning the actual acquisition of the state lands and pointed out to him that we had no intention of paying \$235 an acre as that price did not represent the *average* price of the King and BLM acres contiguous to the state lands. Salazar indicated that the state appraiser has a figure of from \$180 to \$200 per acre in mind. I wanted to disabuse the folks down there of any notion that we would pay the \$235 top dollars. [sic] Actual<sup>y</sup>, the King acres have been acquired at an average price of \$180. The \$235 per acre involved only approximately 2,500 acres and, undoubtedly, included something for Crowder." (GX 732; A. 10565-66). (Emphasis in original).

The defendants did not purchase the state land. Yet, while the defendants paid \$180 an acre for the King property, which comprised units 17 through 26 (See GX 93), and considered \$235 an acre too much to pay for the state land, they began selling off the King property as sound financial investments at prices ranging from \$3,455 to \$6,070 an acre in 1970. (GX 789).

Naturally, by purchasing the additional 37,000 acres of land, Rio Rancho even further diminished any possibility of resale by investors, a fact well known to defendants. (GX 410 p. 8; A. 10420; GX 872; A. 10663). At the time the defendants began to acquire the additional 37,000 acres in 1969, there were roughly 315 houses on 54,000 acres at Rio Rancho Estates.\* (GX

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\* Defendants admitted in SEC filings that the Company's principle business was the subdivision of large tracts of land (GX 395 p. 2; A. 10396) and that its success depended upon an ability to acquire land and sell it on a profitable basis. (GX 410 p. 2; A. 10419). The building of homes was clearly a secondary aspect of the business. (See GX 395; A. 10396).

146t; A. 10202). At that time the entire city of Albuquerque, with a population of roughly 300,000, was only 51,325 acres. (GX 5; A. 9609). By 1971 Rio Rancho Estates totalled more than 91,000 acres or 142 square miles. Clearly then, the 37,000 additional acres were not acquired in response to any demand or need for building sites but only to continue a profitable land fraud investment scheme.\*

### G. The Defendants' Case

The defendants collectively called eight purchasers, all of whom lived at Rio Rancho Estates. Only three of the eight purchasers bought their land at a sales dinner (Davis, Nash, and Quinn). Two bought the land as a result of a visit by a sales person to their home. (Frap-pier, Mellenbrook). Two people, John Kearney and Greta Vives, purchased their land through the mail. Another purchaser, Ruth Lindermann, bought a lot from a friend who lived at Rio Rancho.

All of these purchasers testified that they bought their land with the thought of relocating.\*\* While all but Mrs. Linderman purchased more than one lot, with one excep-

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\* Defendants' contentions that once the property was sold a resale market would develop, had no basis in fact. Given the abundance of vacant land, in and closer to the city of Albuquerque than Rio Rancho Estates, including the west and northwest, there was no reason to believe that a resale market for Rio Rancho lots would develop when or if the company was successful in nationally selling off all of its land. In point of fact, this was a national sales program. Defendants did not sell lots in the Albuquerque market and, therefore, never were competing in the local Albuquerque market with purchasers who wished to resell their lots.

\*\* Several of these purchasers testified that they expected utilities to be extended to the lots they were purchasing. (See e.g. Kearney, A. 6403; Nash A. 6848).



tion,\* none of these purchasers had tried to resell their land. Several of the purchasers who were called intended to or were in the process of exchanging a second half acre lot for a lot in the building area, in order to build a second home. (See *e.g.* Frappier, A. 6441; Davis, A. 6709; Kearney, A. 6336).\*\*

Defendants also called witnesses who testified about the growth of Albuquerque. All of these defense witnesses agreed that the most absolute growth had taken place in the northeast section of Albuquerque over the last 15 years. (Graham, A. 6502; Yguado, A. 7060; Rupley, A. 6640). All agreed that Albuquerque eventually would grow to the northwest, a fact not disputed by the Government. None of these witnesses, however, testified that the only place that Albuquerque could grow was to and through Rio Rancho. Indeed, all agreed that there was land in the northwest available for development before reaching Rio Rancho. See *infra* pp. 54-57.

The principal defense witness with respect to the growth of Albuquerque was Jose Luis Yguado, who testified that there was limited land in the northwest other than Rio Rancho Estates into which the city could grow. Yguado's testimony at trial contradicted an earlier report, written by him in 1963, in which he stated that there was abundant available land on the northwest mesa other than Rio Rancho capable of development. (DX EK; A. 10862).

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\* Ruth Mellenbrook testified that she was successful in selling two commercial lots to a hockey player and that this was accomplished through a local broker in Albuquerque. (A. 6921-2).

\*\* Through these purchaser-witnesses defendants attempted to show that some landholders expected to profit from reselling their homes at Rio Rancho. The fallacy to this defense, of course, was that defendants did not sell land to people on the representation that the only way they could profit was to build several homes and resell them.

The defense case concentrated on the "building area" or "core" community at Rio Rancho, the existence of which or attractiveness as a place to live, were not in dispute. While defense counsel stated in their opening that they would prove a resale market (A. 227), no such proof was forthcoming. Instead, defendants pointed to the sale of two lots by Mrs. Mellenbrook and the testimony of residents at Rio Rancho that their houses had increased in value. In sum, defendants ignored the sale of this land as a financial investment for resale at a profit and instead defended their sales scheme on the theory that all of those who bought the land would move to Rio Rancho Estates, a theory which was roundly contradicted by the evidence.

## ARGUMENT

### POINT I

#### **The Evidence Plainly Was Sufficient To Support The Jury's Verdict That All Defendants Were Guilty Of Engaging In A Fraudulent Scheme.**

All defendants argue that there was insufficient evidence on which the jury could have found them guilty of knowingly and wilfully engaging in the fraudulent scheme charged in the indictment. Specifically, defendants argue (1) there was insufficient evidence to establish that the representations made by them about the growth of Albuquerque and its effect on the value of Rio Rancho lots as financial investments were false or misleading, and (2) that the evidence failed to establish that they did not have a good faith belief in their "opinions" as to these matters. These arguments, of course, were rejected by the jury. Viewing the evidence in the light most favorable to the Government, as this Court must, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United*

*States v. Falcone*, 544 F.2d 607, 610 (2d Cir. 1976), *cert. denied*, — U.S. — (1977), it is beyond peradventure that a reasonable juror could fairly find defendants guilty and their collective attack on the sufficiency of the evidence borders on the frivolous. *United States v. Hawley*, Dkt. No. 76-1469, slip op. 3239 (2d Cir., April 27, 1977).

Defendants' sufficiency argument in the first instance is constructed upon the erroneous assertion that their representations as to the soundness and security of investments in Rio Rancho lots were no more than ordinary and usual "puffing", or mere statements of "opinion". While they recognize that opinions can of course be the cornerstone of a fraud prosecution, *see, e.g., United States v. Rowe*, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932); *United States v. Rubinstein*, 166 F.2d 249 (2d Cir.), *cert. denied*, 333 U.S. 868 (1948), defendants seek to suggest that the present case was somehow an extraordinary and unfair exercise of prosecutive discretion, and that the evidence against them, therefore, should be viewed in a more sympathetic light favorable to defendants. In the face of such protestations—which defendants repeated *ad nauseum* in the District Court—it bears initial emphasis that the evidence at trial compellingly demonstrated that the thrust of defendants' scheme was to represent the investment value of Rio Rancho lots and the necessary growth of Albuquerque to and through Rio Rancho as *documented facts* upon which unsuspecting purchasers could rely. Indeed, the tenor of the sales program actively pursued here conveyed the unhedging message that when talking about the investment and growth representations defendants were only dealing with *facts*. (See e.g. GX 316; A. 10286). In the sales dinners presentations and the advertising literature, defendants did not merely imply that their representations were factual, they explicitly de-



nominated such assertions as bare "facts". Defendants did not couch their representations in the disclaimer language of mere "opinion", but clearly and unequivocally asserted as facts to any unknowledgeable laymen Albuquerque's destiny to expand through Rio Rancho, and the prospects of enormously profitable returns on investment which inevitably flowed from such expansion. In short, the theme of defendants' sales program was to convince prospective customers as a *factual* matter that investment in this property was a guaranteed and secure proposition.

Thus, the representations deliberately made here, far from mere "puffing" or statements of opinion, were of the type upon which fraud prosecutions have traditionally been built and which have uniformly received judicial approval. See, e.g., *Deaver v. United States*, 155 F.2d 740 (D.C. Cir.), *cert. denied*, 329 U.S. 766 (1946); *Blue v. United States*, 138 F.2d 351, 357 (6th Cir. 1943), *cert. denied*, 322 U.S. 736 (1944); *United States v. Beck*, 118 F.2d 178, 181 (7th Cir. 1941), *cert. denied*, 313 U.S. 587 (1941); *Huteson v. United States*, 67 F.2d 731, 732 (7th Cir. 1933), *cert. denied*, 292 U.S. 627 (1934). Accord, *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1032 (2d Cir. 1974) (scotch whiskey futures); *United States v. Grayson*, 166 F.2d 863, 866 (2d Cir. 1948) ("royalties" in oil fields); *United States v. Wernes*, 157 F.2d 797, 798-9 (7th Cir. 1946) (oil leases); *United States v. Earnhardt*, 153 F.2d 472 (7th Cir.), *cert. denied*, 328 U.S. 858 (1946) (oil leases); *Perry v. United States*, 136 F.2d 109 (10th Cir.), *cert. denied*, 320 U.S. 743 (1943) (oil and gas leases); *Foshay v. United States*, 68 F.2d 205, 207-08 (8th Cir.), *cert. denied*, 291 U.S. 674 (1934) (stock).

Moreover, to prove a scheme to defraud under either the mail fraud statute or the anti-fraud provisions of the

Interstate Land Sales Full Disclosure Act \* the Government need not prove actual misrepresentations, *Durland v. United States*, 161 U.S. 606 (1896); *McCarthy v. United States*, 187 Fed. 117 (2d Cir. 1911), that is, "if the words are parsed and the sentences grammatically analyzed, they are false", *Linden v. United States*, 254 F.2d 560, 568 (4th Cir. 1958); *Silverman v. United States*, 213 F.2d 405 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954). Rather the Government's burden is to prove that the representations were intentionally designed to mislead those responding to them. *Lustigar v. United States*, 386 F.2d 132, 138 (9th Cir.), *cert. denied*, 390 U.S. 951 (1968). The Government's evidence at trial clearly met this burden.

In addition, the investment scheme proved at trial was permeated by traditional badges of fraud which further undermine defendants' sanctimonious claim that they engaged in no more than acceptable salesmanlike "puffing". Thus, the deliberate editing of "West Side Story", the false assurances of a soon-to-be-created resale office, the carefully framed disclaimers in filings with the SEC (see e.g. GX 400B; A. 10403), which bore no resemblance to the unequivocal representations made at the same time

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\* In August, 1968, in response to concern about fraudulent practices in the sale of subdivided land, Congress enacted the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* which became effective on April 30, 1969. Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosures Comes Down to Earth*, 21 Case W. Res. L. Rev. 5 at pp. 6 to 21 (1969); Note, *Federal Regulation of Interstate Land Sales: The Limitations of Full Disclosure*, 11 Col. J. Law & Soc. Prob. 133, 135-43 (1975).

The Act was fashioned after the Securities Act of 1933. *United States v. Del Rio Springs, Inc.*, 392 F. Supp. 226 (D. Ariz. 1975), *aff'd sub. nom.*, *Schenker v. United States*, 529 F.2d 96 (9th Cir. 1976), and contains anti-fraud provisions, 15 U.S.C. § 1703(a)(2), which are virtually identical to the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77(q).

to customers, and the high pressured selling technique itself, culminating in an inflated sales price far in excess of actual value,\* all were true indicia of the existence of a scheme and of defendants' intent, which the jury was entitled to consider in reaching its verdict.

Viewed in this proper perspective, we proceed to consider defendants' hollow claims as to the sufficiency of the evidence. As we demonstrate below, defendants' arguments in this regard, while properly made in summations to a jury, plainly should not disturb the jury's verdict which was based on ample evidence.

### A. The Growth of Albuquerque

As set forth in the Statement of Facts, defendants steadfastly told purchasers that there was a scarcity of land in and around Albuquerque, that Albuquerque was "bursting at the seams" and could only grow to the northwest, to and through Rio Rancho Estates. The proof at trial showed that the truth was otherwise than as defendants represented.

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\* While purchasers were led to believe that the lots they were buying would be improved with water, utilities and paved roads and that the purchase price included these improvements, in fact, the lots sold nationally were, and would remain, semi-arid desert lots improved only by dirt roads, without water and utilities. Without the promised improvements the lots did not have a value consistent with the price which purchasers paid. *United States v. New South Farm*, 241 U.S. 64, 71-72 (1916); *McCown v. Heldier*, 527 F.2d 204 (10th Cir. 1975); *United States v. Diamond*, 430 F.2d 688, 690 (5th Cir. 1970); *Golubin v. United States*, 393 F.2d 590 (10th Cir.), cert. denied, 393 U.S. 831 (1968); *Lustiger v. United States*, supra, 386 F.2d at 134-38; *Windsor v. United States*, 384 F.2d 535 (9th Cir. 1967); *Phillip v. United States*, 356 F.2d 297 (9th Cir.), cert. denied, 384 U.S. 952 (1966); *Harris v. United States*, 261 F.2d 792 (9th Cir. 1958), cert. denied, 360 U.S. 933 (1959); *Huteson v. United States*, supra, 67 F.2d at 732; *United States v. Rowe*, supra, 56 F.2d at 749; *McCarthy v. United States*, supra, 187 F. at 118.



The city of Albuquerque is located within Bernalillo County and is primarily situated on the east side of the Rio Grande River. Albuquerque's growth has historically been to the east and northeast.\* No witness called either by the Government or by the defense disputed the fact that the most absolute growth during the 15 years in which defendants had been selling Rio Rancho lots had occurred in the northeast section of Albuquerque, and that there was still available land in the northeast for residential development.

Albert Pierce, the Executive Director of the Middle Rio Grande Council of Governments,\*\* (A. 4205) an association of local governmental units formed in 1967 covering four counties (including Bernalillo and Sandoval counties), and which comprised a State Planning and Development District\*\*\* (A. 4207), testified that since the 1920's the growth of the city of Albuquerque has been eastward (A. 4284) and since the 1950's to the northeast. Pierce explained that all trends and data indicated that this growth would continue to be to the northeast until its development capacity is reached.

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\* The Government introduced three aerial photo mosaics of Albuquerque and the surrounding area taken in 1959 (GX 1073A), 1967 (GX 1074A) and 1975 (GX 1075A) which visually demonstrated the city's growth.

\*\* Pierce was Executive Director for five years and previously had held the positions of Assistant Director and head of the data and management research division of that organization. (A. 4205).

\*\*\* Pierce testified that the function of the Council of Governments (COG) is to provide a vehicle for inter-governmental cooperation on matters relating to long-range development and planning (A. 4209-10). In furtherance of its planning function, the organization maintains a professional staff which continually collects and monitors data about the area. This information included maintaining inventories and surveillance over physical development and growth activities, as well as socioeconomic data relating to population and its distribution. (A. 4214-20).

He estimated that there were approximately 6,000 acres in the northeast (i.e. the Simms property), exclusive of vacant land within the city available for development, and North Albuquerque Acres (A. 4392-94), and testified that it could be another 10 to 20 years for the 6,000 acres to be utilized fully. (A. 4361-2).

Likewise, George Carruthers, the Planning Director for the City of Albuquerque,\* testified that the majority of Albuquerque's growth had been to the northeast and that the city had issued reports, as early as 1962, which projected Albuquerque's expected continued growth to the northeast (A. 4485). In February, 1964, the city issued a "1985 Land Use Plan" (GX 60; A. 9980) which was in defendants' possession (A. 4508-9). That report specifically concluded that the northeast would continue to experience the most absolute growth (A. 9989) and that there was enough vacant land within the study area (which did *not* include Rio Rancho Estates) such that even the most optimistic growth projections would not utilize this land within the current century. (A. 10018). Regarding the Planning Department's most recent study, done in 1975, Carruthers stated that using density figures prevalent for the last twenty years, there was sufficient available vacant land in the study area, again *not* including Rio Rancho Estates, to accommodate approximately 1.1 million people. (A. 4594).\*\*

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\* Carruthers had been with the Albuquerque City Planning Department since 1957. (A. 4465).

\*\* In an effort to confuse the jury, defendants unsuccessfully attempted to contradict Carruthers testimony by using "gross density" as opposed to "developed density" figures. The latter figure accurately reflected the number of people per acre who lived in residentially developed areas; the former figure misleadingly was calculated by taking an average of people per acre based upon both developed *and* non-developed land. Moreover, even applying defendants' erroneous "gross density" figures (5.16 people per acre) to Yguado's discredited limitation of 100,000

[Footnote continued on following page]

Carruthers also agreed that there was still land available in the northeast—excluding North Albuquerque acres—capable of development. He confirmed, as did all other witnesses, that the growth to the northeast would continue. (4677-79).\*

Finally, Carruthers labelled as false defendants' statements in a sales script in 1965, which read as follows:

"There is only one direction in which the city can grow. Through the northwest mesa where Rio Rancho Estates is located. The city planners of Albuquerque give an awful lot of attention to Rio Rancho Estates because this is where the city must grow to, grow into, grow out of." (GX 315; A. 10263, A. 4514-15).\*\*

Kenneth Neiswander, an 18-year employee of the Federal Housing Administration in Albuquerque and for five years the chief underwriter for the State of New Mexico responsible for home mortgage insurance, also disputed defendants' growth-direction representations. He testi-

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available acres in the study area of the Albuquerque 1985 Land Use Plan, it remained clear that the study area, excluding Rio Rancho, still would be able to accommodate another Albuquerque. In 1965, when defendants began to proclaim that the city was "bursting at the seams" and could only grow to and through Rio Rancho, Albuquerque's population was only approximately 250,000 people. Thus, even by defendants' own computations, there was sufficient available land other than Rio Rancho to receive the population of *another Albuquerque*.

\* Contrary to defendants' assertions that "in-fill" was not successful, Carruthers testified that the city had been able to put a large portion of the population increase into the vacant land that existed in the city of Albuquerque in 1963. (A. 4685-86).

\*\* Pierce also testified that defendants' claims in 1965 that the city of Albuquerque could only grow to the northwest were not correct. (A. 4378).



fied that the principal direction of Albuquerque's growth during his time in the area had been to the northeast (A. 4055); that approximately 75% of the subdivided lots in the Albuquerque area approved by the FHA since 1967 were located in the northeast section (A. 4052); and that the most absolute growth had taken place in the Northeast Heights (A. 4091). So too, Raymond Seay and Richard Musgrove, respectively the current and former Mountain Bell forecast supervisors, each testified about Albuquerque's growth in terms of an increase in the number of telephone terminals. According to Seay, since 1960, the northeast office experienced the greatest growth (A. 5078-79). Musgrove testified that in terms of forecasting future needs in 1965 the northeast section was expected to be the heaviest growth area by far. (A. 5120). Musgrove, who appeared in a film for Rio Rancho in 1965, refused to say in the film that Albuquerque could *only* grow to the west, because that was not factual (A. 5118-19; A. 5126-28). Indeed, he pointed out to representatives of Rio Rancho that "another Albuquerque" could be put into the vacant undeveloped areas. (A. 5119).

Darleen McCorkle, a solicitor and tour guide for Rio Rancho for two and a half years\* and a resident of Albuquerque for more than fifteen years, also testified that since 1961 most of Albuquerque's observable growth had taken place in the Northeast Heights with very little growth to the west side. (A. 3156-3159). McCorkle conceded that the Rio Rancho sales presentation was false, both in terms of claiming that Albuquerque could only expand through Rio Rancho, and that the vacant land in the northeast was not available for sale. (A. 3162-3164).

Finally, the Government called as a witness Ralph Avellanet, author of the Harman O'Donnell and Henninger Report (GX 66; A. 10061) commissioned by AM-

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\* McCorkle was employed from April 1970 until October of 1972. (A. 3071).

REP. In September 1965, in preparation for his report, Avellanet was told by two AMREP employees—John Sommerholder and Robert Walsh—that “the trend of growth was east, northeast,” (A. 4807) and furthermore, that the extent of growth to the west side of Albuquerque was “very limited”. (A. 4814). Avellanet, who had reviewed various surveys and studies in the preparation of his report, also testified that because of abundant vacant land in the Albuquerque area, Rio Rancho would not be able to attract a significant number of local customers. Avellanet found that not only was there “sufficient room over in the eastern part of the city to handle most of the development pressures within Albuquerque” (A. 5023), but, there was also land on the west side, south of Rio Rancho and closer to Albuquerque, which was “in some ways better than Rio Rancho’s land to the west, to the west of 528.” (A. 5026).<sup>\*</sup> Avellanet submitted preliminary findings to Rio Rancho in November 1965 (GX 978; A. 10687) and a final report in May, 1966 which concluded:

“Despite the expected doubling of Albuquerque’s population over the next 20 years to over 600,000 residents, ample undeveloped suburban land exists more proximate to the City and its desirable parts than Rio Rancho’s land, such that only a small and selective local market penetration by Rio Rancho is likely over the 20 year period from 1966 to 1985.” (GX 66, p. 40; A. 10108).

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<sup>\*</sup> In fact, the only portion of the subdivision that Avellanet considered to have any potential in terms of appealing to a local market was a narrow strip of land *east* of Highway 528. (A. 4803-04). However, it was only the vast tract of undeveloped land *west* of Highway 528 that was nationally marketed and offered for sale at the dinners; the company held for its own the bluffs east of 528. (A. 4804-4806; A. 5024-5029; See GX 93).

Defense witnesses, as well, conceded that the company's claims that Albuquerque could *only* grow to the northwest were misleading and not true. Thus, for example, Jack Graham, President of the Albuquerque Savings and Loan Association, admitted the following on cross-examination:

"Q. Mr. Graham, \* \* \* Was it true in 1966 that Albuquerque could only grow to the northwest?

A. No.

Q. And it is not true today, is it?

A. That it can only grow?

Q. Yes.

A. No. It still has some growth in Northeast Heights but very little." \* (A. 6505-06).

Reverend Rupley, a defense witness, also agreed that there was land available in the northeast and that only "eventually" would the growth go to the northwest (A. 6627-28), after the Northeast Heights has become completely filled. (A. 6635).

In short, no witness, including those called by defendants, disputed the plain observable fact that the *northeast* had experienced the most absolute growth over the 15

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\* Graham believed there was only 2,500 acres still available for development in the Northeast. (A. 6510). However, he also testified that this figure was based upon the availability of sewer lines within 3 years (A. 6510-11). Moreover, he testified that just two weeks prior to his appearance in court his bank had been able to buy 200 acres in the *northeast* because sewer lines were assured. (A. 6541). As indicated above, both Pierce and Carruthers disagreed with Graham's estimate of only 2,500 acres available in the northeast for future development. (Pierce A. 4265, A. 4359-62; Carruthers A. 4677-79).



years that defendants were selling property on the claim that growth was "only" in a different direction.\*

To the extent that Albuquerque's future growth to the west and northwest would occur, the evidence plainly showed that such potential growth certainly need not reach Rio Rancho Estates, nor for that matter, would any expansion short of Rio Rancho bring benefits to defendants' real estate.

Both Pierce and Carruthers agreed that Albuquerque eventually would grow west and northwest—a fact not disputed by the Government—but both contradicted defendants' representation that such northwest growth had to be to and through Rio Rancho Estates.

Pierce, for example, testified that there were 30 to 35 square miles in the northwest quadrant of Bernalillo County \*\* between the volcanic escarpment and the river, which had a high propensity for home development. (A. 4403-06; 4457-58). This property, which was part of the Alameda Land Grant (A. 4403) (north of the Atrisco Grant) included College Heights, Taylor Ranch, Volcano Cliffs and Paradise Hills (A. 4403-06), and was located south of Rio Rancho Estates closer to the city of Albuquerque. (GX 1075A). Indeed, the enumerated development areas, except for Paradise Hills, were those the defendants deleted from the film "West Side Story," which was shown to purchasers. (GXs 69, 70).

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\* Indeed, Pierce testified that he believed the growth to the northeast— not including North Albuquerque acres—would continue for the next 10 years. (A. 4265, A. 4359-62). Carruthers agreed, pointing out that one development planned for the Northeast Heights would not even get underway for another 7 to 8 years. (A. 4679).

\*\* This did not include the Atrisco property.

Additionally, Pierce testified that the Atrisco property, approximately 48 square miles of which were in the northwest quadrant, was also available for development. (A. 4402-03). Defendants' contention that the Atrisco Land Grant was unavailable for development due to title problems, was belied by both Pierce and Carruthers, who testified that there had been development on the Atrisco property since the early 1960's. For example, Pierce pointed to the Snow Vista development and Westgate Heights\* both of which were on the Atrisco property. (A. 4408). Carruthers and Pierce also pointed to an industrial park and airport on the Atrisco property (A. 4774). Moreover, Pierce testified that such title problems as did exist with respect to the Atrisco property had been resolved beginning in 1968 with the formation of the Westland Development Company.\*\* (A. 4280-82). Carruthers testified that the title companies had advised the city that they could give clear title to the city on the Atrisco property, (A. 4774) and both he and Pierce agreed that the city of Albuquerque had plans for further development on the Atrisco property.\*\*\*

Indeed, a 1975 report issued by the Albuquerque City Planning Department and Bernalillo County (DX EL; A. 10893), identified the Atrisco property as a priority area for development and capital improvement (DX EL; A. 10905-06), along with other areas where water trunk lines are in place, i.e. the College Heights area (College Trunk) and the Volcano Cliffs area (Volcano Trunk) (*Ibid.*). The 1975 study, however, pointedly did *not* include Rio Rancho Estates.

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\* Westgate Heights was also a subdivision which defendants edited from the film "West Side Story." (See GX 69).

\*\* Pierce testified that there was some litigation still pending with respect to the peripheral outer boundaries of the Atrisco property. (A. 4333).

\*\*\* According to Carruthers, the city was putting a golf course on the Atrisco property. (A. 4774).

Finally, evidence elicited in the defense case also proved the falsity of the claim that such expansion as might occur to the west and northwest would inevitably include Rio Rancho Estates. The 1963 report "Growth and Development Study, Northwest Mesa Area—Albuquerque, New Mexico" (DX EK; A. 10862), purchased by defendants \* and written by their own expert, Jose Yguado, described the northwest mesa as 80 to 100 square miles in size which was "buildable and usable in almost its entirety." (A. 10869). The 80 to 100 square miles referred to by Yguado in 1963 \*\* included only a small fringe portion of Rio Rancho property.\*\*\* (See, area map at A. 10874).

Indeed, the Yguado report noted that as early as 1963, 20,000 acres in the northwest mesa had been "Master

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\* Yguado testified that defendants purchased six copies of this 1963 report. (A. 6971-72).

\*\* At trial, Yguado—the only witness who was paid to testify on substantive issues—contradicted his 1963 report and testified that there was only 6 to 8 square miles in the northwest mesa, other than the Rio Rancho property, capable of development. (A. 6965). This testimony was wholly contradicted by both Pierce and Carruthers. Yguado's about-face at the trial only charitably can be described as lacking in credibility. Moreover, there was no evidence that Yguado had in any way communicated his new-found beliefs to defendants after their purchase of his 1963 report.

\*\*\* Yguado specifically referred to this area as follows:

"Common lands of the Atrisco Grant, approximately 25,000 acres north of U.S. 66, extending from the Rio Puerco Basin area to the St. Joseph-Volcano area. *This land is now under contract for surveying, preliminary to master planning and development on a broad scale for industry, housing, etc.* NOTE: Not shown in this projection of the Northwest Mesa Area is the Atrisco Grant property south of U.S. 66. Approximately 25,000 acres, this portion of the Atrisco Grant contains the 3,500 acre Snow Vista Subdivision, which has large areas now developed in housing." (DX EK, A. 10872). (Emphasis added).



Planned" *not* including Rio Rancho property. (DX: EK, p. 10; A. 10878).

Graham, likewise agreed on cross-examination that there was plentiful other land in the northwest, excluding Rio Rancho land, and admitted that a statement in the defendants' sales script (GX 316; A. 10287) that "the city can only expand in one direction, and that direction is squarely through Rio Rancho Estates" was "not completely accurate." (A. 6536-37).

In response to this proof, defendants fashioned an argument at trial that attempted to modify the representations uniformly made to purchasers over a 15 year period. They urged the jury to believe that their representations conveyed to purchasers no more than the possibility that after the northeast was filled growth could take place to the northwest and, that all indications suggested such growth would include and benefit Rio Rancho land. This contention which defendants now urge demonstrates the insufficiency of the Government's evidence, was at most a factual dispute properly left to the jury's sole province to evaluate and reject. Moreover, the record plainly belies defendants' "eleventh-hour" caveats to their sales representations.

The thrust of the promotional material, including maps with arrows pointing to Rio Rancho (GX 271;\* A. 10241), the sales presentations (GXs 314-317; A. 10246-324; GX 671(a); A. 10547; McCorkle, A. 3102-03), and the edited film "West Side Story" (GX 69), conveyed to purchasers the intended impression that Rio Rancho was the next and necessary step in order for Albuquerque to continue to grow. As early as 1965 defendants' sales script stated: "The city has pushed out as

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\* Maps identical to this exhibit were in use since 1966. The HUD disclaimer contained on GX 271 was required beginning in December, 1973. (Perlmutter A. 3551).

far as Paradise Hills. You saw it in both films." Paradise Hills, a subdivision adjoining Rio Rancho, was the only one not edited out of the film "West Side Story." The reason was obvious. Defendants were able to use it to convince people that Rio Rancho was next in line to receive Albuquerque's expansion. Indeed the same script (GX 315) made the claim: "Now we are ready for Albuquerque, Albuquerque is ready to fall right into Rio Rancho Estates" (A. 10268); (*see also* A. 1026).<sup>\*</sup> Moreover, this implausible defense was roundly contradicted by defendants' own favorite phrase that "Albuquerque was bursting at the seams" <sup>\*\*</sup> and now could *only* grow to the northwest through Rio Rancho. In the face of such overwhelming proof, defendants' protests in this Court that there was insufficient evidence of the falsity of the growth representations are simply astounding.

## **B. Value of Rio Rancho Lots as Financial Investments**

Defendants' national sales campaign offered prospective buyers a single principle inductment to purchase Rio Rancho lots: that an investment in this property was a

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<sup>\*</sup> This theme continued after 1965, as evidence not only by the testimony of purchasers (Finnen A. 1624-5; Greenberg A. 1720; Jones A. 1826; DeWitt A. 2237; Mohammed A. 2500; Bonavisa A. 2751; Fox A. 2821) but also by defendants employees. (Bondy A. 1402-3; Masone A. 2111; Monaco A. 2364). For example, Darlene McCorkle, testified that at the sales presentations she attended in Albuquerque the speaker always emphasized that "there wasn't anywhere for Albuquerque to go except to be funneled right through Rio Rancho Estates," and that was the most important part of the presentation. (A. 3102-03).

<sup>\*\*</sup> Even defendants' "star" witness, Yguado, reluctantly admitted on cross-examination that the statement about Albuquerque "bursting at the seams" was at least in one sense not true. (A. 7147-48).

"guaranteed" safe and profitable one, assured to yield returns considerably more favorable \* than traditional investments in securities or savings.\*\* This central sales representation rested on the assertion that there would be a brisk local resale market in Albuquerque that would be fueled by Albuquerque's predictable expansion to the northwest through Rio Rancho. While customers purchased lots in volume on the strength of this stark representation, the evidence at trial overwhelmingly demon-

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\* As indicated earlier in the recitation of facts, customers were encouraged to expect yields of up to 25% per year on Rio Rancho lots. See, *supra*, at pp. 11-12.

\*\* In this respect, defendants' repeated citation to *Davis v. Rio Rancho Estates, Inc.*, 401 F. Supp. 1045 (S.D.N.Y. 1975) is misleading. Judge Brieant's decision was merely on a motion to dismiss a civil complaint, pursuant to Rule 12(b), Fed.R. Civ. P. Indeed, a careful review of the record before Judge Brieant (75 Civ. 1779-S.D.N.Y.) discloses that the only evidence before him was an affidavit of the plaintiff, plaintiff's purchase agreement and statement of account, two promotional brochures,—“How to Live—Retire—Invest in the Sunny Southwest,”—a later version of which, GX 379, was introduced in this trial—and “This is My Land”—both later and earlier versions (GX 384, 388) of which are in evidence—and an undated letter from Rio Rancho requesting that plaintiff complete a company questionnaire. Thus, Judge Brieant was unaware of the promotional films, the speakers' presentations at the sales dinners, the strategic use of “This is My Land” in the context of the overall sales presentation, the lulling letters sent to purchasers which touted their investment, the manner in which salesmen were trained and the abundant other evidence presented to the jury in this case, which demonstrated that the land was primarily sold as a safe and secure financial investment.

Moreover, the issue before Judge Brieant was not whether the land was sold as an investment but whether the transaction was an “investment contract” within the ambit of the anti-fraud provisions of the Securities and Exchange Act of 1934, 15 U.S.C. §78j and Rule 10b-5, promulgated thereunder. Indeed, on the limited record before him, Judge Brieant concluded that the land was sold, at least in part, as an investment because the claims of development and growth bore directly on investment value.



strated that the claim of a sound investment was false. In fact, no resale market existed in Albuquerque and those who misleadingly acquired Rio Rancho lots on the investment premise were stalking financial disaster.

Ronald Williams, formerly with the Albuquerque Board of Realtors from 1967 until November of 1976 (A. 5198), testified that there was no local resale market for Rio Rancho property and indeed that realtors belonging to the Multiple Listing Service of the Board refused to list lots for sale because of a dearth of prospective buyers. (See *supra* pp. 36-37). Throughout the trial victimized landholders explained their inability to find purchasers for the lots they had acquired as purportedly sound investments. In addition to reciting their vain pleas to the company for assistance with resale,\* witness after witness described efforts both in Albuquerque and home towns to unload their "guaranteed" investment. Richard Gray listed his property for six months with Paul Heinz (A. 5809); Mrs. Hampe listed for a year with Heinz (A. 358-60); Dr. Sporzynski listed for three years with Heinz, and contacted other Albuquerque realtors, all to no avail (A. 5498-5506). Mr. and Mrs. Switt listed with Heinz and ran ads in both the New York Times and Albuquerque newspapers. (A. 2907-8). Mrs. Henry visited an Albuquerque realtor who refused even to list her lots. (A. 465). Mrs. Greenberg wrote to 75 Albuquerque realtors (See GX 1309; A. 10798), received replies from two of them (see GX 1309A; A. 10799), wrote those two again, and never heard further (A. 1757); she also tried unsuccessfully to sell her lots through the Rocky Mountain Auction (A. 1780-3). Dennis Finnerty tried unsuccessfully to sell his property through brokers in Long Island, Bronx and Yonkers.

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\* Harriet James, a former employee, testified that she received from 20-30 phone calls a day from property owners who couldn't sell their lots (A. 3770).

(A. 2657-8). Of the three witnesses able to resell lots, two did so at a substantial loss on their original purchase price,\* and the third barely recouped 12% of his total investment in Rio Rancho.\*\* Indeed, the 1975 local auction managed to dispose of only 33 lots of 2,156 lots listed for sale, at an average price of \$500. And, of course, the prospects for a local resale market were further diminished by defendants' continued efforts to flood the national market with additional sales of the later acquired 37,000 acres from the King property.

Moreover, for those who purchased commercial lots or ranchettes, the worth of their investment hinged totally on development of entire areas surrounding their property. A holder of commercial property could not hope to find a willing commercial tenant absent development of an adjacent populated community and did not have any "exchange privilege". Commercial property investors, therefore, were dependent upon the veracity of defendants' representation that Albuquerque soon would expand to Rio Rancho Estates, necessitating the development of all of Rio Rancho property. Their investments, accordingly, simply were worthless from the outset of defendants' sales program and remained so during the period of time covered by the indictment.

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\* Purchasers Clymer and Kaufman each sold one lot through the August 1975 Rocky Mountain auction. Kaufman received \$495 from a total sale price of \$550 for a lot purchased from the company for \$3495 (Kaufman GX 136b; A. 5328); Clymer netted \$430 from a \$500 sale price for a lot purchased 13 years earlier for \$1000. (A. 5383-5). Prior to selling at auction the Clymers had listed their property for sale with an Albuquerque realtor for a year, and similarly with the Pan American Land Company.

\*\* Gustav Mols effected the private sale of one of his lots by convincing the buyer (a friend of a friend) to purchase a lot for a price less than half the then current AMREP selling price for a similarly situated lot (A. 3846-7). This was Mols' only successful sale despite repeated efforts to sell through Albuquerque realtors and the Clack and Hill Digest (GX 1407-G).

Finally, in remarkable contrast to the uniform representations made by AMREP to encourage sales, when landowners inquired of the company about how to resell their property defendants admitted that there was, in fact, no resale market for Rio Rancho lots. See *supra* p. 35.

While defendants apparently concede, as they must, that the proof clearly showed the absence of any resale market during the 15 years of their sales, they argue that the evidence was insufficient to show that Rio Rancho was not a "good investment," since the term itself is subjective and did not necessarily convey the meaning that Rio Rancho lots were "quickly" marketable at resale.\* (AMREP Br. at 59). This claim, as with the falsity of the Albuquerque growth representation, was for the jury to decide, and neither defendants nor this Court may "substitute our own view of the evidence for that of the jury." *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976). Moreover, defendants' trial efforts to retreat on the alleged broadness of their factual representations, in any event, were both disingenuous and to no avail. The simple answer to defendants' contention as to the meaning of "good investment" is that the term was clearly defined by them in the context of their own sales program.

Thus, the investment value representations uniformly approved and made by defendants during their sales program unflinchingly emphasized guaranteed and immediate returns on investment. Orchestrated sales presenta-

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\* In this regard, the defendants Carity and Daniel Friedman claim error in the trial court's refusal to charge "that illiquidity or lack of a ready resale market does not in and of itself establish that the land sold was a bad investment." In so arguing the defendants have parsed one sentence from a long and rambling request (A. 8255) which was properly characterized by the trial court as "all argument to the jury." (A. 7479). This contention was clearly a question of fact for the jury and not the proper subject of a charge as a matter of law.



tions talked in terms of an investment program "that has consistently outperformed" other investments (GX 256; A. 10239-40) and was as "guaranteed and protected" an investment as one can find. The examples of investment return contained in the pamphlet "This is My Land," portrayed substantial profits on a yearly basis on land investments. If, as defendants incredulously now contend, such examples were misleadingly understood by investors, the fault properly rested with defendants alone who made the misleading claims, and the jury plainly was entitled to conclude that such examples were deliberately intended by defendants to mislead customers as part of the fraudulent scheme proved at trial.

Similarly unpersuasive were defendants' efforts to hide behind an alleged disclaimer statement buried in the New York Offering Statement from 1969 forward.\* First, this statement did no more than advise customers that until utilities reached their lot—an event customers were led to believe would happen soon—and until the company completed the sale of Rio Rancho lots—again a situation customers were told soon would occur—resale might be difficult. However, viewed together with the promotional material and sales presentations which took prominence over the offering statement, this statement still would lead a purchaser to believe that Rio Rancho was developing rapidly, that utilities would soon reach

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\* The statement, which appeared on page 3 of the document, reads as follows:

"Lots may also be purchased for speculative purposes but such purchasers are advised that resale for a profit may be difficult for a number of years in view of the fact that water and utilities may not be available to certain lots for an indefinite number of years; that a percentage of the purchase price paid is included therein for use in advertising and development; and that in trying to make a resale the purchasers may be competing with the Company, which has thousands of lots to sell." (DX CK; A. 10809).

the purchaser's lot, and that the growth of Albuquerque unquestionably would result in a resale market for Rio Rancho lots. Nothing in the alleged disclaimer contradicted defendants' representations about the growth of Albuquerque or its effect on resale of lots at Rio Rancho. Second, the disclaimer itself, never referred to the attention of customers and generally unseen by them,\* was greatly overshadowed by other written and oral sales claims that Rio Rancho was rapidly developing, that lots would soon be sold out and that a resale market in Albuquerque would be available to purchasers to realize a quick profit on their investment at Rio Rancho. Finally, the disclaimer was misleading. It did not forewarn customers that defendants had no intention of ever extending utilities to outlying lots, thus assuring the worthlessness of their investment.

Defendants also argue in this Court, as they did to the jury which rejected their contention, that Rio Rancho land in fact had value because other land in and around Albuquerque had increased in value over the 15 years. This claim simply is not supported by the record and further ignores the fact that defendants encouraged customers to understand that "value" was measured by the price for which the property could be resold on the open market. (Mandel, A. 1119). Naturally, since there was no local market for Rio Rancho land, the lots sold by defendants were worthless to the vast majority of investors.

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\* Courts have taken into consideration as evidence of a scheme to defraud such circumstances where customers were discouraged from reading contracts or where alleged disclosures were concealed in fine print, *Irwin v. United States*, 338 F.2d 770, 775-76 (9th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965); *United States v. Littlejohn*, 96 F.2d 368, 373 (7th Cir.), *cert. denied*, 304 U.S. 583 (1938); *United States v. Sylvanus*, 192 F.2d 96 (7th Cir. 1951), *cert. denied*, 342 U.S. 943 (1952); *Gottlieb v. Schaffer*, 141 F. Supp. 7, 17 (S.D.N.Y. 1956); or where material was designed and used in such a way that it would not be read closely. *Donaldson v. Read*, 333 U.S. 178 at 189 (1948); *Linden v. United States*, *supra*, 254 F.2d at 568.

In support of their theory of value defendants point to the testimony of Peter Olguin. Olguin testified that property in the *village* of Corrales—not to be confused with Corrales Heights at Rio Rancho—which was 2 to 3 miles from Rio Rancho, had increased in value. (A. 5170). However, Olguin also explained that there was a resale market for land in the village of Corrales, as contrasted with Rio Rancho land where there had been no resale market during the entire time that he was in the real estate business. (A. 5194). Likewise, defendants point to testimony by Yguado regarding land he purchased in College Heights and which he resold at a profit. Yguado's land, however—where Taylor Ranch is now located (A. 6982)—is approximately 8 miles south of Rio Rancho on the west side of Albuquerque, not the 2 miles as stated by defendants Carity and Friedman (Br. p. 32), and was one of the subdivisions which defendants edited out of the film "West Side Story." Today, Taylor Ranch has a ten year master plan for 10,000 homes. It is one of the areas, among others, on the west side of Albuquerque that the Government proved at trial was available for the continued growth of the City of Albuquerque.\*

Finally, the claim that Rio Rancho land had increased in value was totally dispelled by the fact that from 1969 to 1971, 8 to 10 years after defendants had commenced national large scale sales of their land, they acquired an additional 37,000 acres at a price of \$180 per acre: \$2.00 more than they had paid 8 to 10 years earlier.

In sum, the evidence plainly showed that the only value of Rio Rancho land was to defendants themselves,

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\* Typical of Carity's and Daniel Friedman's versions of the proof, they glibly point to increased value of Rio Rancho land without citation to the record, by stating that county real estate taxes increased between 1961 and 1976. While defense counsel stated in their opening that they would call a county tax appraiser, (A. 228) none was forthcoming.



who sold their lots to misguided investors at inflated prices and thereby realized enormous profits from their venture.

### **C. The Evidence was Sufficient to Establish Bad Faith on the Part of Each Defendant**

All defendants argue that even assuming the falsity of the growth and value representations, as discussed *supra*, the evidence nevertheless was insufficient for the jury to conclude that the defendants acted in bad faith, or did not hold good faith views with respect to these representations. These claims are all without merit.\*

#### **1. Chester Carity**

Chester Carity was Executive Vice President and a director of AMREP, as well as an officer and director of Rio Rancho Estates, Inc., and ATC Realty Corp. He was responsible for the daily overall operations of the company's land sales operations. His involvement in the company's operations was total.

Carity wrote or reviewed the advertising and promotional material (GXs 475A, 491; A. 10452, 10453) used to sell Rio Rancho land and the original scripts (GXs 315, 316; A. 10258, 10274) used at dinner parties (A.

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\* The corporate defendants, as well, join in this issue. Since the corporation is legally charged with the acts and knowledge of its responsible officers, and to avoid further repetition, we will not set forth separately the overall compelling proof which collectively establishes the bad faith of the corporate defendants. Moreover, as indicated earlier in this brief, the continued factual misrepresentations by the corporations while the corporations had plain knowledge otherwise, were themselves compelling proof of bad faith.

797, 810, 828-29, 849, 852, 856, 3551-52). He attended dinner parties and listened to at least one tape recording of a dinner party presentation (A. 833, 1215, 1281). He reviewed the company's delinquency letters which touted Rio Rancho as a good investment (A. 3290-98), (GXs 604, 1046, 1066; A. 10509). Carity also was involved in the opening of new sales offices (A. 814-15), received reports on sales activities and statistics from these offices (A. 820, 830, 839, 900, 1176-77, 1191-93) (GXs 358-363; A. 10341-10369), and spoke at sales meetings attended by office managers (A. 3414-15). He participated in the decisions to implement regular price increases for Rio Rancho land (A. 943, 1258, 3430, 3435) which were used as a selling tool (GX 991; A. 10702) to persuade customers that the value of the land was constantly increasing. (GX 128f; A. 10144). See *supra*, at 20-23.

Carity, therefore, clearly knew and was responsible for the sales claims made on behalf of Rio Rancho.

While Carity was aware of the specific representations which formed an integral part of Rio Rancho sales, he also knew that Rio Rancho land was not becoming more valuable—indeed that its value at any figure was questionable given the absence of a resale market. In fact, Carity signed numerous SEC filings which stated that resale was difficult and that there was no resale market. (GXs 395, 402, 409A, 410; A. 10394, 10406, 10412, 10417). Moreover, he had knowledge of AMREP's acquisition of an additional 37,000 acres—as did *all* the other individual defendants—tacked on to Rio Rancho Estates between 1969 and 1971, at the same time that he knew landholders were unsuccessfully trying to resell their land and were asking about AMREP's promised opening of a resale office. (A. 1046-56) (GXs 1034, 1035; A. 10774, A. 10775).

Furthermore, Carity's knowledge and approval of the representation that Rio Rancho was a "good investment" was completely at odds with the fact also known to him and all the other individual defendants that the 37,000 acres cost AMREP only \$2 per acre more than did the original 54,000 acres 8 to 10 years earlier (GXs 400; A. 402, 732; A. 10406, 10565). Certainly this was a plain indication to Carity and the other officers that the value of land at Rio Rancho was not going up as much as 25% every year as customers were led to believe.

Carity's bad faith also was demonstrated in connection with AMREP's misrepresentation of the direction of Albuquerque's growth and the effect it would have on Rio Rancho. Carity reviewed the 1965 Harman O'Donnell & Henninger report and thus had to know that AMREP's growth claims were not accurate (GXs 984, 985; A. 10697, 10698). See *supra* at 33-35. Despite that report—the conclusions of which were never challenged or disputed by AMREP when received, or at any time thereafter until the trial—and despite AMREP's possession of the Albuquerque Planning Department's 1985 Land Use Plan, issued in 1964 (GX 60; A. 9980) which foreshadowed the conclusions in the Harmon O'Donnell & Henninger report—Carity supervised the uninterrupted sales campaign for Rio Rancho Estates containing all the discredited claims of the direction and speed of Albuquerque's growth.

As early as 1962 Carity understood that Rio Rancho's claims concerning Albuquerque's growth could not be justified. An SEC filing signed by him, stated:

"The company does not of course know what growth if any Albuquerque will experience in the future or if any such growth will benefit the company." (GX 400B; A. 10403).

And as late as 1973, Carity still had knowledge that Albuquerque's growth was not affecting Rio Rancho Estates.



In a company memorandum (GX 657; A. 10521) sent to Carity, among others, the stark conclusion appears that Albuquerque had had no significant affect on the growth of Rio Rancho Estates.

In his position of executive responsibility, Carity understood that AMREP never intended to develop fully the 91,000 acres of Rio Rancho Estates, although the contrary impression was clearly conveyed to purchasers. He knew that there were not a sufficient number of exchange lots available to accomodate all lots sold (GX 931; A. 10674), as evidenced by his review of the Harmon O'Donnell report which recounted defendants' belief that only 5% of the people who bought land eventually were expected to move to Rio Rancho.\*

Finally, Carity's lack of good faith with respect to the sales representations is best demonstrated by his handwritten notations on a memo sent to him concerning AMREP's commitments to Rio Rancho (GX 498; A. 10454). The memo mentions "the commitments that the company has toward Rio Rancho Estates." In referring to "commitments", Carity wrote, "Ye gods no. Never use that word. All they want is to pin us down." With respect to the "company['s] intentions," Carity wrote: "Cannot commit anything!"

On this record, Carity's claim of insufficient evidence is simply preposterous.

## **2. Daniel Friedman**

Daniel Friedman began with AMREP in 1963 as assistant controller, and by 1971 was Vice President of Sales. As such, he was directly in charge of and re-

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\* Indeed, the company projected no more than 350 to 400 homes per year (GX 963; A. 10677), which would have required 200 years to develop Rio Rancho Estates.

sponsible for the daily operation of the national, and international, sales effort. Friedman recruited, hired, and trained brokers who ran the sales offices around the country (A. 813-817, 3391, 3404) (GX 517; A. 10459), and worked on the Rio Rancho sales manual as well as reviewed it with brokers and sales managers (A. 841, 1139; GX 1200). Friedman remained closely attuned to the sales program, attending sales dinners, periodically receiving tapes of dinners conducted at the many sales offices (A. 819, 835-36, 1215, 1486) (GXs 517, 530, 531, 541, 546; A. 10459, 10471, 10472, 10485, 10487) and reviewing periodic reports on sales from the sales offices. (A. 830-31, 834, 1176, 1193, 3374, 3378) (GXs 358-363, 517; A. 10341-10369, 10459). He received the AMREP procedure manual and promotional literature book and worked on the many forms used in the sales offices. (A. 835, 3281, 3310-12, 3485). Friedman regularly attended sales meetings of the regional directors during which all aspects of the Rio Rancho sales operation were discussed. (A. 929, 1995-97, 2448, 2451, 3399-3400, 3414). He was in receipt of reports on the results of company-sponsored tours to Albuquerque and Rio Rancho (A. 1274-75) (GXs 767, 768; A. 10633, 10637). Friedman was familiar with all types of sales programs (A. 2463) (GXs 517, 530, 544, 567; A. 10459, 10475, 10486, 10504) and was intimately acquainted with AMREP's practice of "loading." See *supra*, at 21-22.

In short, the evidence showed that Daniel Friedman was closely acquainted with all aspects and details of the Rio Rancho sales effort and knew precisely what claims were made to induce people to buy land at Rio Rancho.

In the same vein, Daniel Friedman was well-versed in facts—not imparted to prospective customers—that proved the falsity of defendants' representations and provided the proof of his own bad faith.

Daniel Friedman distributed the rider used solely for customers overseas who were buying land priced in excess of \$30,000. This rider stated that Rio Rancho land was not easily resellable and constituted an illiquid investment (A. 3449-3455) (GXs 357, 539, 681; A. 10340, 10476). The overseas rider's information, however, was not told to prospective customers in the United States; indeed, the exact contrary impression was fostered when the Rio Rancho sales pitch *favorably* compared a purchase of land at Rio Rancho to other, more traditional, investments and claimed that an investment in Rio Rancho was "safe" and guaranteed returns.

In his intricate role of leading the sales training and recruiting operations for Rio Rancho, Friedman applied his philosophy that AMREP could only be successful in selling land if a proper mass psychology was created at the sales dinners. Lawrence Perlmutter, Vice President for Administration, testified that Daniel Friedman told him that it was necessary to maintain the proper attendance at dinners in order for the mass psychology to work (A. 3323). Friedman's notion of mass psychology centered about creation of a sense of urgency at the dinner parties—a feeling in part created and transmitted to customers by use of the "holds" system. See *supra* at 17-20. Daniel Friedman urged AMREP's sales forces to transmit this sense of urgency to customers to successfully sell at the dinner parties. Thus, in a memo to the head of the Wisconsin sales office, Friedman wrote:

"I noticed that a few of your salesmen used maps at the closing tables. I do not recommend this procedure as our previous results indicate we are not therefore able to *create the urgency that is necessary for the sale.*" (GX 531; A. 10473) (Emphasis added).



Daniel Friedman, like all the other individual defendants, also knew that periodic price increases were a powerful selling tool to create the atmosphere of urgency. Indeed, in a memo to the sales offices announcing a price increase Friedman wrote:

"There are roughly nine weeks before these new prices take effect, nine weeks to close sales with the *most powerful urgency tool there is*. This is potent selling ammunition, start using it immediately." (GX 991; A. 10703) (Emphasis added).

Friedman's resort to mass psychology and a contrived atmosphere of urgency was one of several factors that pointed up the lack of his own good faith belief in the soundness and security of a Rio Rancho investment.

Daniel Friedman's bad faith was also shown by his clear knowledge that no resale market existed for land at Rio Rancho. In AMREP's SEC filings, signed by Daniel Friedman, (GXs 395, 402, 410; A. 10394, 10406, 10417), and in the company's forms letters \* with which he was familiar, (GXs 149h, 158e, 645, 652, 655, 1310c; A. 10203, 10206, 10515, 10519, 10800), Friedman displayed clear knowledge that defendants' sales representations had no basis in fact.

Friedman like Carity, also knew that AMREP's good investment claims could not be justified on the company's own development plans. He was similarly aware that there were insufficient lots held in reserve in "exchange areas" (GX 931; A. 10674), and that the company projected no more than 350 to 400 homes per year (GX 963; A. 10677) a fact which meant that it would take almost 200 years to fully develop Rio Rancho's 91,000 acres.

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\* Quoted at 35, *supra*.

In this Court, Daniel Friedman argues that even if the Government demonstrated his bad faith on the "good investment" representation, because the Government allegedly failed to show his lack of good faith on the "growth to northwest" aspect of Rio Rancho's sales promotion, a reversal is required under *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). This argument is wrong both factually and legally.\*

It was undisputed at trial that the Albuquerque Planning Department's 1985 Land Use Plan, issued in 1964 (GX 60; A. 9980), was in the company's possession. The trial court ruled that the Plan was admissible against all the individual defendants (A. 7451). The jury plainly was entitled to infer that a corporate officer of Friedman's responsibility, given his close and essential connection to all aspects of the sales campaign, would have reviewed documents such as the 1985 Plan which were directly pertinent to his corporate position. See, e.g., *United States v. Dillard*, 101 F.2d 829 (2d Cir. 1938), *cert. denied*, 306 U.S. 635 (1939). Indeed, Daniel Friedman's demonstrated attention to detail, as exemplified in many of the corporate memoranda introduced in evidence, certainly permitted the jury to infer that Friedman, like other officers of similar responsibility, had acquainted himself with reports in AMREP's possession about the growth of Albuquerque. Thus, the jury was entitled to find that Friedman was familiar with the 1985 Plan's conclusions which refuted defendants' growth claims.

It is basic that a defendant's fraudulent intent—his lack of good faith—may be inferred from his activities

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\* We consider in Point II, *infra* at 78, Friedman's and other defendants' arguments that reversal is required under *United States v. Natelli*.

and actions. *United States v. Caine*, 441 F.2d 454 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971); *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *Golubin v. United States*, *supra*; *Blachly v. United States*, 380 F.2d 665 (5th Cir. 1967). The responsible and powerful position held by Daniel Friedman in AMREP and his actions in performing his job provided abundant evidence from which a jury could have found and inferred bad faith. Certainly the sufficiency of the proof with respect to Daniel Friedman far exceeds that found sufficient to sustain the conviction of Katritsis in *United States v. Hanlon*, 548 F.2d 1096, 1100 (2d Cir. 1977). What was stated in *Bentel v. United States*, 13 F.2d 327, 329 (2d Cir.), *cert. denied*, 273 U.S. 713 (1926) is true here:

"[W]hile there is no allowable inference of knowledge from the mere fact of falsity, there are many cases, where from the actor's special situation and continuity of conduct an inference that he *did* know the untruth of what he said or wrote may legitimately be drawn."

### 3. Henry L. Hoffman \*

Henry Hoffman was a Vice-President and Senior Vice-President of AMREP from 1961 until late 1974. Hoffman also was a director of AMREP from 1961 until at least 1975 and a major shareholder. In addition, he was a director of ATC Realty Corp. from 1963 to 1969 and Vice-President and a director of Rio Rancho Estates, Inc. until 1974.

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\* Neither Hoffman nor Howard Friedman (p. 76, *infra*) raise with the same specificity of the other two individual defendants the claim of insufficient evidence on "bad faith." However, it may be subsumed in their general "sufficiency" argument.



As proven at trial, the extent and areas of Hoffman's involvement in corporate affairs demonstrated more than sufficient evidence from which the jury could find Hoffman's bad faith.

Hoffman had clear knowledge how Rio Rancho land was sold to the public and what representations were made to induce people to buy Rio Rancho land. He was involved in writing advertising material (A. 797, 828) as well as scripts for the dinner parties (A. 810). He helped produce the promotional films "Your Golden Future" and "West Side Story," both of which were shown at the dinner parties (A. 797, 850) (GX 638; A. 10514). As previously described (pp. 15-16, *supra*), the edited version of "West Side Story" was highly misleading in that it deleted references to other subdivisions west of Albuquerque and closer to the city than Rio Rancho. Hoffman attended dinner parties (A. 834) and discussed with other officers many aspects of the presentation (A. 794, 821, 835-36, 1282 (GX 629; A. 10512), including the periodic price increases (A. 1258).

Accordingly, Hoffman knew that Rio Rancho land was represented as a good and secure financial investment, better than liquid investments such as stocks, mutual funds, and savings accounts.

He also knew that Rio Rancho was not the sound financial investment it was represented to be, as exemplified by his signing of AMREP's SEC filings which stated that resale was difficult (GXs 402, 410; A. 10406, 10417).

Hoffman also participated in negotiations for the original purchase of the 54,000 acres of Rio Rancho (GX 806), as well as the acquisition of the 37,000 additional acres (A. 1199), for which the company paid an average price of \$180 an acre, an increase of only \$2 per acre over the price originally paid in 1961.

That AMREP's claims regarding the beneficial effects of Albuquerque's alleged inevitable growth pattern were false and misleading were matters also unquestionably known to Hoffman. He signed the 1962 SEC filing (GX 400B; A. 10400) which admitted that AMREP did not know the direction of Albuquerque's future growth, or its effect on Rio Rancho. Hoffman also received and reviewed the Harmon O'Donnell & Henninger report. (GX 985; A. 10698).

In sum, the evidence showed that Hoffman had numerous compelling reasons to appreciate the falsity and excesses of Rio Rancho's sales representations. His continued approval of such misleading claims, together with what the jury could find to have been his deliberate effort to distort the truth—as evidenced by the editing of "West Side Story"—more than amply justified the jury's verdict of guilt.

#### **4. Howard Friedman**

Howard Friedman was Secretary and Controller of AMREP from 1961 until 1966, when he became Treasurer. In 1968 he became President of AMREP. Friedman also was a director of AMREP since 1961 and a major shareholder. He was Secretary of Rio Rancho from 1961 until 1968, when he became President of Rio Rancho and was a director of Rio Rancho throughout this period of time. Howard Friedman also was a director, Secretary and Treasurer of ATC Realty from 1963 to 1970 and President of ATC in 1971.\*

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\* Besides his other jobs, Friedman was the President and director of Double R. Realty, Inc., a wholly-owned subsidiary of AMREP, which was a member of the Multiple Listing Service of the Albuquerque Board of Realtors.

Like the other individual defendants, Howard Friedman was intimately involved in all aspects of the Rio Rancho sales effort. He attended dinner parties (A. 818-19, 1279, 1487, 1988-91, 2377), discussed mailings for the dinner parties (A. 791-92), interviewed new brokers (A. 815), visited sales offices (A. 833), received reports on sales, closing rates, responses to mailings, and average sale price and cost (GXs 358-363, 557; A. 10341-10369, 10499). Friedman also helped to construct marketing approaches used in selling Rio Rancho land. (A. 1035, 3441) (GXs 468, 567; A. 10448, 10504). Moreover, Friedman regularly participated in discussions about the success of the tours to Albuquerque and Rio Rancho, (A. 1274-75), and was consulted on changes in the purchase contracts dealing with the exchange privilege. (GX 604; A. 10509).

Howard Friedman, like Daniel Friedman, Carity and Hoffman knew that AMREP's "good investment" representations were false and misleading. Again, in SEC filings signed by him and from form letters sent to purchasers with which he was well-acquainted, Friedman was properly held to knowledge that there was no resale market, and therefore that an investment in Rio Rancho land could not be better than stocks, mutual funds or savings accounts. Furthermore, as in the case of other defendants, Friedman knew that the company's acquisition of the additional 37,000 acres was indicative of the fact that Rio Rancho land was not increasing by as much as 25% per year. Howard Friedman also was responsible for the misleading use of price increases (A. 1258). As was true with other corporate officers, Friedman received and reviewed the Harmon O'Donnell report, and signed the 1962 SEC filing which stated that the company did not know how Albuquerque would grow or if such growth would beneficially affect Rio Rancho Estates.



Thus, like Hoffman, Carity and Daniel Friedman, Howard Friedman was involved in every major aspect of AMREP's land sales operation. His familiarity with the substantial documented material which demonstrated that Rio Rancho's sales claims were false and misleading, supplied the basis for the jury's finding that he acted in bad faith. Friedman, as did his co-defendants, shared in the enormous profits of the fraudulent scheme blatantly and unrelentlessly pursued over 15 years, and cannot now be heard to complain that he was not an active, knowledgeable participant.

## POINT II

### ***United States 1. Natelli Has No Application To This Case.***

All defendants argue that if there was insufficient proof with respect to the falsity of either the claim of (1) investment value or (2) the growth of Albuquerque, but not both, then under *United States v. Natelli*, 527 F.2d 311 (2d Cir. 1975), cert. denied 425 U.S. 934 (1976), the resulting "general" verdict of the jury requires a new trial on the issue for which there was sufficient proof. In view of the clear sufficiency of the evidence as to all defendants on all matters, this Court, of course, need not reach this issue. See Point I, *supra*, at pp. 43-78. Moreover, defendants' argument must fail in any event since *Natelli* is factually and legally inapposite to the case at bar. First, defendants here completely failed to preserve their claim in the District Court in the specific manner prescribed by *Natelli*. Second, as we demonstrate below, *Natelli* does not apply to conspiracies or schemes to defraud which involve joint ventures. Third, *Natelli* applies only where a jury is given an incorrect legal theory to apply to the facts and the reviewing Court cannot determine that the jury's verdict also rests on a proper legal theory.

It does not apply where the jury was given a proper legal theory.

### A. The *Natelli* Decision

Defendants' scant discussion of the point fails to set forth either a factual or legal analysis of *United States v. Natelli, supra*. Their omission is for good reason since a thorough analysis of *Natelli* shows that none of the defendants here come within its limited ambit.

*Natelli* and his co-defendant Scansaroli were tried on a single count alleging violation of the securities law in that they made, or caused to be made, false and misleading statements in a proxy statement. Two specifications of false statements were set out in the indictment, but were not unified through the allegation that they were part of a single scheme to defraud. Nor were defendants joined together in a count alleging conspiracy, or by a jury instruction on joint ventures.\* Both the crime and the criminals were presented as separate and distinct entities. Moreover, the question of Scansaroli's guilt in connection with one false statement was improperly submitted to the jury. The *Natelli* Court held that as a matter of law this specification should not have gone to the jury on the legal theory charged, in light of the limited responsibility which Scansaroli exercised within the accounting firm hierarchy, and the fact that the particular evidence on each specification of falsity was unrelated to the other.

The *Natelli* Court also made clear that it reached this issue only because the defendant had properly preserved the question in the district court. Thus, the defendant

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\* In fact Judge Tyler, who presided over the *Natelli* trial, gave only a minimal charge on aiding and abetting. (Trial Tr. 2371).

in *Natelli* had unsuccessfully sought an instruction that the jury had to be unanimous on the particular specification found to be false before a conviction could be rendered, and Scansaroli, in his motions for a judgment of acquittal, also asked the court, with sufficient particularity, to withdraw from the jury's consideration evidence relating to the second specification of falsity. While Scansaroli had not directly asked the trial judge to withdraw from the jury the second specification of falsity, his co-defendant did, and, taken together with Scansaroli's motion concerning the evidence relating to the second specification, this Court concluded that the issue had been preserved, although it was a close question.

By contrast, none of the defendants here—including Daniel Friedman—ever approached the steps taken in *Natelli* to preserve the point. The defense did not request any kind of a "unanimity" instruction, nor did any defendant specifically seek to have stricken from the jury's consideration evidence of either one of the false representations made by defendants.\* Instead, at the close of the Government's case, and again at the end of the entire case, defendants simply moved for directed verdicts of acquittal as to the entire indictment. When those motions were denied, no defendant sought the further relief of withdrawal of a portion of the indictment or even of any particular evidence relating to either false representation. Indeed, at no time in the requests to charge, in the arguments on the Rule 29 motions, or in the brief in support thereof, did defendants even cite *Natelli* to the District Court. The first mention of it appears in defendants' post-trial motion papers. Under *Natelli*, the failure to have made such a motion *and* to have requested a particularized instruction, is fatal and precludes defendants from raising in this Court the contention that the evidence as to one or the other of the

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\* That the defendants knew how to move to strike evidence under similar circumstances is demonstrated by their particularized motions to strike other evidence and certain paragraphs of the indictment. (See, e.g., A. 6078, 6113-19, 7335-74).



false claims was insufficient. See, *United States v. Natelli*, *supra*, 527 F.2d at 327; *United States v. Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948); *United States v. Mascuch*, 111 F.2d 602, 603 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940).

**B. Natelli Does Not Apply to the Sufficiency of Evidence for a Particular Means of a Scheme to Defraud with Multiple Members**

Even if this Court concludes that any of the defendants adequately preserved the issue for appellate review—and we vigorously urge that none did—*Natelli* does not apply to the sufficiency of a particular means of a fraudulent scheme comprised of several members.

Unlike *Natelli*, the indictment here charged a scheme to defraud carried out by a number of defendants who joined in the object of the scheme and in carrying it out by the means alleged. The essence of a scheme to defraud, when joined in by more than one person, is the unlawful plan or agreement itself, as opposed to any particular representation of the schemers. Moreover, such a scheme is, in effect, a conspiracy in which each defendant is held responsible for the acts of all others committed in its furtherance. *United States v. Pinkerton*, 328 U.S. 640, 647 (1946); *Blue v. United States*, *supra*, 138 F.2d at 358. Once the Government has established that a defendant has joined the scheme, that defendant is responsible for every past and future act of all of his co-schemers—his agents—which are in furtherance of the scheme, even if he had no knowledge of such acts. *Pinkerton v. United States*, *supra*; *United States v. Wiley*, 519 F.2d 1348 (2d Cir.), *cert. denied*, 423 U.S. 1058 (1975); *United States v. Bynum*, 485 F.2d 490, 496 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *United States v. Cohen*, 145 F.2d 82 (2d Cir.), *cert. denied*, 323 U.S. 799 (1944); *Blue v. United States*, *supra*, 138 F.2d at 357 (not all sales representations known to all defendants). Thus, regardless of

whether there was sufficient evidence against a particular defendant on all aspects or means of the scheme to defraud, the jury was entitled to consider all the evidence against *each* defendant in weighing his individual guilt. *United States v. Lubrano*, 529 F.2d 633 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976); *United States v. Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). *Natelli*, of course, did not involve the type of joint agreement charges found here, and therefore the theory of vicarious conspiratorial liability was not available to warrant defendant's conviction on the alternative specification of falsity. Rather, the essence of the charges in *Natelli* was the *false statement* itself, as opposed to an unlawful plan or agreement.

The significance of this distinction is made apparent by the result reached in cases where an indictment charges a conspiracy or scheme to defraud with multiple objects or means and the reviewing court upholds the conviction because there was sufficient proof as to any one of the objects or means. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940); *Moss v. United States*, 132 F.2d 875 (6th Cir. 1943); *United States v. Tanner*, 471 F.2d 128 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. Frank*, 520 F.2d 1287, 1293 (2d Cir.), *cert. denied*, 423 U.S. 1087 (1975).

It follows that in a scheme to defraud case, unlike a filing of false statements case, a defendant may be convicted upon proof that he knew of the existence of the scheme to defraud and joined it with the intent to defraud. Since a defendant is responsible for the acts of his co-schemers, he need not know all of the scheme's means or all of the misrepresentations used to achieve

its purposes, and is even chargeable with misrepresentations used before his entry into the scheme.\*

Thus, in the instant case, Judge Metzner correctly charged the elements of a scheme to defraud. (A. 7967-75).\*\* He also correctly charged that:

"It is not required that each of the schemers participate in or had knowledge of all of the operations of the scheme. The guilt of the schemer is not governed by the extent of his participation. It is not necessary that all schemers have participated in the alleged scheme from its inception.

"A person who comes in at a later point with knowledge of the scheme's general operation, although not necessarily all of its details, and who intentionally acts in a way to further the unlawful goals becomes a member of the scheme and is legally responsible for all that may be or has been done in furtherance of the criminal objective." (A. 7971-72).

The jury here, unlike in *Natelli*, also was given a complete aiding and abetting charge. (A. 7976-77).\*\*\* The jury was charged correctly on the requirement that they be unanimous on the required elements of the of-

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\* Since a defendant cannot be heard to complain that he was unaware of certain representations, he cannot be heard to complain that he did not know certain claims were false, as long as the jury is charged that they must find that each defendant joined the scheme with an intent to defraud. Similarly, if a schemer knows that a statement is fraudulent because it conceals certain material facts, it is irrelevant that the Government failed to prove that he had knowledge of other material facts known to his co-schemers which also made the statement fraudulent.

\*\* No exception was taken to this aspect of the charge.

\*\*\* No defendant, including Daniel Friedman, took exception to the aiding and abetting or co-schemer instructions.



fense.\* Since they could properly find each defendant had joined the scheme with an intent to defraud, even without knowledge of all or any specific sales representation or its falsity, and could consider the acts of all co-schemers on the question of guilt,\*\* no reversal is required as to any defendant, even if there was insufficient evidence as to a defendant on either the investment or the growth of Albuquerque representations which were among the particular means of the fraud.

**C. The Jury Did Not Consider The Case On An Improper Legal Theory, And Therefore There Is No Basis For Reversal Under *Natelli*.**

Defendants' reliance on *Natelli* is in error for a second reason. Contrary to defendants' argument, *Natelli* is not based upon insufficiency of evidence, but upon the propriety of the legal theory on which the jury was to

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\* The *Natelli* court recognized that if the jury had been charged that they had to be unanimous on a particular specification, the verdict would have been sustained without regard to which specification they chose. 527 F.2d at 325.

\*\* As we have emphasized earlier, defendants did not submit any *Natelli* charge, or any request to charge which sought to tailor *Natelli* to a fraudulent scheme case. Assuming *arguendo* that there was insufficient evidence to show that a defendant did know one of the means of the fraud, that defendant would have been entitled to no more than an instruction that advised the jury not to consider the evidence set out in the challenged section of the indictment as a basis alone for his conviction or as direct evidence against him, but to consider such evidence against the defendant in deciding whether there was a joint venture and whether the object of the scheme was as alleged. Since defendants did not request such a charge, they cannot complain that the District Court failed on its own to give this instruction. Rule 30, Fed. R. Crim. P., *United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). *Cf. United States v. Dillard*, *supra*, 101 F.2d at 833.

judge the facts. In *Natelli*, the jury was not properly instructed on the scope of Scansaroli's responsibility in the accounting hierarchy, and under the circumstances, on unanimity.

*Natelli* is an expression of a well-established line of cases in this Court which hold that when a jury has rendered a general verdict on a count presented to it on an erroneous or flawed legal instruction, the verdict will be reversed even where evidence may support conviction if the case had been presented to the jury on a sound legal theory.\* This result is reached, when the issue is properly preserved, because a reviewing court cannot determine whether the verdict rests on the jury's application of the facts to the erroneous legal doctrine or to approved legal standards.

Such cases, however, are markedly different from those in which there is simply an evidentiary insufficiency as to part of a count which the trial court has allowed to

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\* The cases following this principle and reversing convictions arise in a wide variety of circumstances. See, e.g., *Stromberg v. California*, 283 U.S. 353 (1931) (statute in disjunctive; court instructed that conviction could be had on any one of the prohibited acts, including one protected by First Amendment and which the prosecutor emphasized); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (jury instructed that ordinance prohibited constitutionally protected speech as well as other acts); *Yates v. United States*, 354 U.S. 289 (1957) (conspiracy to violate Smith Act alleging two objects, one found to be barred by statute of limitations); *Street v. New York*, 394 U.S. 576 (1969) (convictions may have been based on that part of statute prohibiting constitutionally protected speech); *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965), (two phase narcotics conspiracy; court failed to charge that if jury found insufficient evidence to link defendant to second phase, it must find that phase not barred by statute of limitations); *United States v. Adcock*, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971), (charge of three false statements to Immigration Service; improper jury instruction on meaning of "preparer", relevant to one assignment of falsity).

go to the jury.\* In the latter situation, the appellate court follows the general principle and does not look behind the jury's general verdict to upset a conviction on the *speculation* that the jury, applying the proper law to the facts, chose to convict on that portion of the indictment where there was insufficient evidence but not also to convict on that part where there was sufficient evidence. See, e.g., *Turner v. United States*, 396 U.S. 398 (1970).\*\*

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\* This point was not fully briefed by the Government in *Natelli*. The *Natelli* panel's third opinion observed that a proper request to the trial court would preserve an objection on insufficiency of the evidence, though that may not be as true in cases charging alternative ways of violating a statute stated in the conjunctive or in other circumstances. 527 F.2d at 328. As support for the first point, the *Natelli* decision cited *Stromberg v. California*, *supra*. *Stromberg*, however, does not support the proposition, since the point was not presented in the trial court in that case. *Terminiello v. Chicago*, *supra*, at 5. Moreover, *Stromberg* involved a statute stated in the disjunctive. Categorizing *Stromberg* as a Constitutional case or even a First Amendment case does less to explain the holding, in light of cases such as *United New York and New Jersey Sandy Hook Pilots Assoc. v. Halecki*, 358 U.S. 613 (1959); *United States v. Cox*, 432 F.2d 1326 (D.C. Cir. 1970) and *United States v. Adcock*, 447 F.2d 337 (2d Cir. 1971), than does recognition that the jury in *Stromberg* received erroneous instructions on the law, a circumstance not present in cases involving statutes of the same disjunctive model.

\*\* Cases of this nature arise in a variety of circumstances. The most obvious situations involve statutes written in the disjunctive which are set forth in the indictment in the conjunctive and in which convictions are supported by sufficient evidence as to any one of the modes of committing the offense. *Turner v. United States*, 396 U.S. 398, 420 (1970), provides the basic principle governing in such cases:

"The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged."

[Footnote continued on following page]



Indeed, this Court has reached the same result in cases where the defendant sought to force the Government to elect the theory on which its case was presented to the jury,\* or where an indictment charges a conspiracy or scheme to defraud with multiple objects or means and the reviewing court finds that there was sufficient proof as to any one. *United States v. Socony-Vacuum Oil Co.*, *supra*; *United States v. Mack*, *supra*; *Moss v. United States*, *supra*; *United States v. Tanner*, *supra*; *United States v. Papadakis*, *supra*; *United States v. Frank*, *supra*.\*\*

Thus, if *Natelli* even applies to factual disputes over means used in a conspiracy or joint venture, the only way it can be read consistently with the lines of cases represented by *Stromberg-Yates* and by *Turner and Mack*,—which *Natelli* clearly did not presume to overturn *sub silentio*—is to recognize that Scansorolli's conviction was upset simply because the charge relating to his duty to

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*See also, Crain v. United States*, 162 U.S. 625, 634 (1896). The rule is well recognized in this and other circuits. *United States v. Astolas*, 487 F.2d 275 (2d Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States v. Barbato*, 471 F.2d 918 (1st Cir. 1973); *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972); *United States v. Ippolito*, 438 F.2d 417 (5th Cir. 1971), *cert. denied*, 402 U.S. 953 (1971).

\* For example, despite the preservation of the point in the district court and the patent ambiguity as to facts found in a general verdict resting on a charge containing mutually exclusive theories, this Court unhesitatingly has affirmed convictions where the evidence supports a statutory violation by *any* of the ways charged. *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968) (charged allowed jury to find defendant guilty as either principal or agent).

\*\* A further corollary to this rule is found in cases where convictions have been affirmed, despite the partly erroneous legal theory presented to the jury, because this Court has assured itself that the jury convicted on the basis of a conspiratorial object other than that founded on a legal infirmity. *See, e.g., United States v. Bottone*, 365 F.2d 389, 394-5 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966); *United States v. Jacobs*, 475 F.2d 270, 282-84 (2d Cir.), *cert. denied*, 414 U.S. 821 (1973); *United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976).

know did not differentiate between him and Natelli on the question of duty. Therefore, the jury was given an improper legal instruction with respect to determining the sufficiency of evidence on one of the two specifications of falsity.

Moreover, the reading of *Natelli* urged by defendants here calls in question a principle even more settled in law: the rule against special verdicts. Under defendants' expansive view of *Natelli* the only obvious method for avoiding retrials of lengthy and complex cases, where an appellate court disagrees with the trial court as to the sufficiency of some particular part of the evidence, would be to require a special verdict. Defendants also, in effect, ask this Court to reverse the time-honored willingness of a reviewing court to place confidence in the ability of a properly instructed jury to convict on that part of a charge supported by sufficient evidence, rather than on that where there is insufficient evidence.

This Court's decision in *United States v. Droms*, Dkt. No. 76-1232, slip op. 2035 (2d Cir. Feb. 25, 1977) affirms that *Natelli* made no such widespread changes in well-settled law. The defendant in *Droms*, similar to *Natelli*, was charged with filing a document with the IRS which was false and perjurious in two separate and different material respects. After the Government rested, Droms specifically challenged the sufficiency of the evidence as to one specification, and asked that the jury not be permitted to consider it. The jury was charged on both specifications, but told they could convict on either or both, if they all agreed on each specification.\*

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\* Here, it is clear that the jury knew that they had to be unanimous on the elements, including each defendant's intent to defraud and knowing participation in the scheme.

On appeal defendant argued that the trial court erred in permitting the insufficient specification to reach the jury and therefore that the resulting general verdict was vulnerable since it could not be determined if the jury had convicted on a proper specification. The Court in *Droms, supra*, slip op. at 2037-38, readily disposed of this claim:

"Nor need we decide whether the evidence was sufficient to go to the jury on the asset-disposal question. 'The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . ., the verdict stands if the evidence is sufficient with respect to any one of the acts charged.' *Turner v. United States*, 396 U.S. 398, 420 (1970); see *United States v. Conti, supra*, 361 F.2d at 158."

See also *Vitello v. United States*, 425 F.2d 416 (9th Cir.), *cert. denied*, 400 U.S. 822 (1970); *United States v. Edmondson*, 410 F.2d 670, 673 n.6 (5th Cir.), *cert. denied*, 396 U.S. 966 (1969).

We submit in the last analysis, that *Natelli* must be read carefully for its correction of legal error in the duties ascribed to members of the accounting hierarchy and in the trial judge's failure there to give a requested unanimity charge as to the specifications stated. To read *Natelli* as if it licenses reversal of this or any case in which the evidence as to one of several specifications, means of fraud or conspiratorial objects, is not sufficient, marks an unjustifiably broad departure from well-established precedent.



## POINT III

**The Court Did Not Withdraw From The Jury's Consideration The Issue Of Defendants' Good Faith Belief With Respect To Their Filings With New York State.**

Defendants seek reversal of their convictions on the ground that the District Court withdrew from the jury's consideration the purported defense that defendants rightfully believed the filing requirements of government agencies, including New York State, constituted actual approval of the substance and merits of their misrepresentations. They argue further that the trial court improperly limited their argument to the jury on this issue. This argument both is startling on the record in this case—where the trial judge uniformly gave defendants more than their fair due on all matters,\* including this issue—and is simply incorrect.

Assuming *arguendo* on this record that defendants were entitled to make an argument of reliance upon state filings as actual approval of their claims, thereby negating bad faith, the trial court did *not* withdraw from the jury's consideration what defendants *believed* as a result of their compliance with filing requirements of regulatory agencies. Nor did the District Court limit defendants' argument to the jury on the issue of their good faith belief. Indeed defendants argued extensively to the

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\* Since appellants raise this issue, it is worthy of note that at every turn of events Judge Metzner afforded to defendants not only a "fair" trial, but a trial in which defendants' rights were scrupulously protected in excess of that which was required, often to the prejudice of the Government's right to a fair and impartial trial. Indeed, a close reading of the record here makes clear that if ever there was a trial where defendants cannot be heard to complain that their rights were vigorously protected by the trial judge, this surely was such a case.

jury on this very point. The District Court specifically charged the jury on defendants' contention that "they had an *honest belief* that the statements made in those materials were true," and pointed to defendants, "adherence to all state and federal agency regulations" as support for the contention as to their honest belief."\*

Defendants protest, however, that the trial judge's instruction to the jury that the acceptance of the filing of an advertisement by the regulatory agency "does not indicate a view by the government agency as to the truth or falsity of the statements contained in such material," (A. 7983)\*\* was improper and legally incorrect. Con-

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\* Judge Metzner charged:

"The defendants deny that they are guilty of any of the charges contained in this indictment. In the first place, they do argue that what was said in the films, the printed promotional material, the sales presentations at the dinners, and the reports filed with the various regulatory agencies is true. In addition, they claim that even if the statements are found to be untrue, they had an *honest belief* that the statements made in those materials were true. They have advanced many examples for your consideration that these contentions are correct, and they never intended to make any false representations. They point to the fifteen years of construction and growth in the Rio Rancho developed community which are still continuing. *They bring out their adherence to all state and federal agency regulations, and their complete compliance with all contract promises.*" (A. 7982-83). (Emphasis added).

\*\* The court charged the jury that "the filing of property reports and promotional literature with state and federal agencies is required by law. The acceptance by the agency of the filing and, for example, giving an NYA number for a brochure, indicates only that the defendants furnished the information required by state law. It does not indicate a view by the governmental agency as to the truth or falsity of the statements contained in such material." (A. 7983).

trary to defendants' assertion (AMREP Br. p. 19), this charge was a proper statement of the law.\*

Article 9-A of the New York Real Property Law, which deals with subdivided land, requires a subdivider to file a sworn statement and Offering Statement with the New York Department of State, prior to offering or selling subdivided land in New York State. (Real Property Law § 337-a). This statute further provides that the sale of subdivided land cannot be made unless accompanied or preceded by the delivery to the prospective purchaser of an Offering Statement. (Real Property Law § 337-b-6.) The law also requires that advertisements used to sell subdivided land must be filed with the Department of State. (Real Property Law § 337-b-3). Most importantly, the Real Property Laws and regulations promulgated thereunder specifically provide that a filing with the Department of State, including filing of advertisements, does *not* constitute approval by the Department.\*\* Moreover, the statute and regulations

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\* Indeed, counsel for Carity and Daniel Friedman recognized this fact in argument to the jury:

"Every piece of promotional material, you have heard, all of it is submitted to the various states. The states didn't say or put their imprimatur on that. It says right in the front, 'We neither approve or disapprove the contents of this.' We are not arguing that meant the state was behind Rio Rancho. We are arguing the good faith of these people in submitting their materials to the state, the fact that they were in a regulated industry." (A. 7807).

\*\* Section 338.8 of the Real Property Law specifically provides that it is a *crime* to represent

"... in any manner that the state, the department of state, or any officer thereof *has recommended or acquiesced in the recommendation of the purchase of any subdivided lands offered for sale or lease, in advertising or offering such subdivided lands for sale or lease.* . . ." (Emphasis added).

[Footnote continued on following page]



also specifically require *disclaimers of state approval* to be placed on Offering Statements and on advertising.\*

Although the statute and regulations specifically contradict defendants' claim that as a matter of law the filing amounts to "approval," defendants point to a regulation which provides that the state will review advertising for "form, language and content."\*\*

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Regulations promulgated pursuant to Article 9-A of the New York Real Property Law also provide:

(b) No subdivider or his or its agent or agents or employees shall directly or indirectly, advertise, represent or make any claim, oral or written, that the State of New York or the Department of State or the Division of Licenses, or any employee, agent or representative of the State of New York or the said department, or division, *has approved or recommended or acquiesced in the approval or recommendation of the purchase of any subdivided lands offered for sale or in advertising or offering subdivided lands for sale.*" (Emphasis added). 19 N.Y.C.R.R. § 135.13. See also, 19 N.Y.C.R.R. §§ 135.14(g) and 135.17(b).

\* Section 337-b-5 of the Real Property Law provides:

"The first page of the offering statement and the face of all advertising and literature employed in the sale or lease or offer for sale or lease of subdivided land shall contain a statement in easily readable print that the *filing of the verified statement and offering statement with the department of state does not constitute approval of the sale or lease or offer for sale or lease by the department of state or any officer thereof, or that the department of state has in any way passed upon the merits of such offering.*" (Emphasis added). See also 19 N.Y.C.R.R. § 135.14(g) and 19 N.Y.C.R.R. § 135.17(b) and (f).

\*\* The regulation provides:

"In reviewing the advertising or promotional material the Department of State will determine whether the same is in violation of article 9-A of the Real Property Law and the applicable sections of this examining form, language and content of the material, as supported by the record and other information available to it." 19 N.Y.C.R.R. § 135.17(e).

From this they argue that while state review does not mean "endorsement" of the product, it does constitute a finding by the state of the "*bona fides*" of the statements contained in the advertising. This argument is no more than a misleading play on words. If the state was passing on the "*bona fides*" of the representations then, by definition, it would be giving the filing its "approval" and passing on its "merits," which is precisely what the Real Property Law—to which the regulation makes reference—indicates the state cannot do. Moreover, under the defendants' construction, regardless of whether the subdivider had made full disclosure to the agency or whether the state agency had any information independent of that supplied by the subdivider, acceptance of the filing thereafter would constitute a binding determination that the advertising was non-fraudulent. Such a construction simply cannot withstand analysis of the statute's plain language to the contrary.\*

Thus, to the extent that in summations defendants suggested to the jury that in fact they had received state approval by the mere act of filing, Judge Metzner clearly was entitled to spear this "red herring." *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, slip op. 2063, 2068 (2d Cir., Feb. 28, 1977).\*\*

In any event, the matter is rendered wholly speculative, and the claim here wholly specious, by the fact that

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\* Indeed, the New York statute itself contains anti-fraud provisions prohibiting fraud in the sale of land, *notwithstanding filings of advertisements*, etc. with the Department of State. Real Property Law § 338.5(b); 19 N.Y.C.R.R. § 135.16(c). Under defendants' view, this criminal provision would be totally ineffective once a subdivider's filing with the state had been accepted.

\*\* Indeed, given the misleading cross-examination conducted by defense counsel, the District Court would have been justified in giving this charge even if defendants made no reference to it in summation. (See, e.g. A. 2057).

there was insufficient evidence in the record from which the jury could have inferred, let alone understood, that the individual defendants believed that filing with New York State constituted actual approval of their representations. First, none of the individual defendants testified, nor did defendants call any witness either from the New York State Department of State, or anyone who dealt directly with the Department. Thus, there was simply no direct evidence as to what any individual defendant believed was the consequence of the act of filing with the state.

Second, the testimony relied on as raising this defense (AMREP Br. 20-22), was from employees, called by the Government, who had *no* responsibility whatsoever for filing advertising with New York State and who shed no light whatsoever on the *defendants'* state of mind as to the filings with New York State. Indeed their testimony was conflicting as to what they understood was the significance of filing advertising with New York State. For example, Lederman, a team manager, testified that as far as he knew, the "NYA" numbers on advertising meant no more than that the literature had been filed with the state, because the disclaimer said that the state "neither approves nor disapproves of the information." (A. 2078).\*\* Bondy and Monaco, both sales managers, testi-

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\* In fact, the Government was precluded from introducing evidence specifically showing that defendants were on notice from various state agencies that filings did not constitute approval and that the company was responsible for the accuracy and veracity of all statements made to the state and the public. (A. 5448-49, 3551-60). The District Court admonished the Government to wait and see what was in defendants' case before this evidence might become relevant. (A. 5445). (See also A. 3671).

\*\* Defendants' exercise in semantics in attempting to equate "filing" with "approval" is made clear in the cross-examination of Lederman:

[Footnote continued on following page]



fied that an "NYA" number on a piece of promotional material meant that it had been recorded or registered with the Department of State. (Bondy A. 1494; Monaco A. 2396). So too even Perlmutter testified that:

"\* \* \* my understanding of an NYA number is that New York State has reviewed and approved the literature for us to use it.

Q. Is it your understanding that New York State is vouching for the accuracy of the statements made in that literature?

A. *I have no way of knowing that.*" (A. 3669-70) (Emphasis added).

In sum, having called no witness to testify directly as to the impact of the New York State filings, defendants must rely on the claim that their "crucial" defense was supported by cross-examination. Since, as demonstrated above, the record did not shed any light on defendants' understanding with respect to the practice of filings in this regard, they can hardly complain that they were denied a "crucial" argument to the jury. Indeed, Judge Metzner did not prevent defendants from pursuing this

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"Q. And with respect to the offering statement, New York State Offering statement is approved by the state, also, isn't that so?

A. As far as I am concerned—as far as I know, not approved, no.

Q. Excuse me.

The report itself is approved by the State, was it not?

A. I don't understand what you mean by—the statement—

Q. The report could not be used until submitted to the state, am I correct?

A. It is submitted to the state, yes.

Q. And the state had to say, 'All right, you can use it,' am I correct?

A. Yes, that you can use it, yes.

Q. That's what I meant by 'approved.'" (A. 2057).

line of inquiry on cross-examination, nor did he stop defense counsel from making this argument to the jury, notwithstanding the paucity of evidence—if any—on this defense. In such circumstances, the District Court was entitled to comment further than he did on this specious defense.\* His exceedingly gentle instruction, correctly stating the law for the jury, scarcely can be viewed as prejudicial to defendants.\*\*

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\* With respect to defendants' claim that Judge Metzner erred in denying their Request to Charge No. 26 (AMREP Br. at 25-7), it should be clear that the trial court did charge in substance that evidence of compliance with state laws could be considered on the questions of good faith and intent. (A. 7982-3). The balance of the requested instruction was not warranted given the absence of any evidence from which the jury could infer the defendants' belief that filings constituted approval of their representations.

\*\* It bears final, but brief, emphasis that even if the record justified an inference that defendants believed filings constituted approval, such a defense could not have been available absent full disclosure by defendants in their filings. The burden to show full disclosure plainly was with defendants, but they totally ignored this matter. By analogy to the reliance on advice of counsel defense, defendants not only have the burden of proving full disclosure, but a correct charge on the topic requires that the jury be instructed it must find full disclosure before the defense is operable. See, e.g., *Williamson v. United States*, 207 U.S. 425, 453 (1908); *United States v. Diamond*, *supra*, 30 F.2d at 694; *United States v. Hickey*, 360 F.2d 127, 142-43 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States v. McCormick*, 67 F.2d 867, 870 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). Defendants' proposed instructions made no reference to this requirement. Accordingly, the claim of error with respect to the "belief" instruction must fail on this ground alone. *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

**POINT IV****The District Court's Evidentiary Rulings Were Correct.****A. The Tape Recordings Were Properly Admitted In Evidence**

The defendants claim that the District Court committed error by admitting into evidence two tape recordings without proper authentication. In this Court the primary arguments appear to be that the Government failed to establish chain of custody and, in failing to do so, neglected to show that the tapes had not been altered. These claims are specious.

The first tape in issue is Exhibit 671 A and B, which is a tape of a Rio Rancho dinner presentation held in Buffalo, N.Y. on October 8, 1968.\* Howard Mandel, AMREP's Vice President for Sales from 1968 until 1970, testified that sales dinner presentations were tape recorded, that the tapes were forwarded to him, that he reviewed the tapes, and that he kept the tapes in his office. Mandel testified that the dinner presentations were a regularly conducted business activity of AMREP, that it was the regular practice of AMREP to tape these dinners periodically, and that it was the regular practice of AMREP to have these tapes sent to the New York office from time to time. When Mandel left AMREP and was replaced by Peter Zaknich, he left the tapes behind. (A. 888-90, 893-97).

Zaknich testified that sales dinners were tape recorded, that the tapes were forwarded to him and to Mandel before Zaknich became Vice President for Sales, that he listened to the tapes, that they were basically the same presentations as at Rio Rancho dinners that he had personally attended, and that he kept the tapes

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\* The transcript of this recording was marked as GX 671. (A. 10547-10564).



while he worked for AMREP. Like Mandel, Zaknich testified that the dinners were a regularly conducted business activity of AMREP, and that it was AMREP's normal practice to tape dinner presentations periodically. Zaknich testified that upon leaving AMREP in 1971, he maintained possession of some of the tapes, which he eventually turned over to the Government. (A. 1213-17, 1224-28).

Both Mandel and Zaknich testified that the dinner presentation recorded on Exhibit 671 A and B was basically the same as dinner presentations which they personally attended.

The second tape in question, Exhibit 669A, was a tape recording of a sales meeting conducted by Sid Hollander on October 1, 1968 in Denver, Colorado.\* It was one of the tapes that Mandel received and turned over to Zaknich, who thereafter maintained possession of it until he turned it over to the Government. Both Mandel and Zaknich testified that regional managers periodically held sales meetings, the purpose of which was to train and to motivate the salesmen in the field offices. Both Mandel and Zaknich testified that it was part of AMREP's company policy to have such training and motivational sales meetings conducted when needed, and that Sid Hollander, who was a regional manager, conducted such sales meetings. Zaknich identified Sid Hollander as the speaker on Exhibit 669A. (A. 891-93, 1186-87, 1217-18).

The defendants strenuously argue that the tapes were not properly authenticated. However, in doing so they fail to refer even once to the governing law, namely, the Federal Rules of Evidence. Contrary to the various legal tests for authenticity recited in their brief, Rule 901(a),

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\* The transcript of this recording was marked as GX 669. (A. 10525-10546).

Fed. R. Evid., provides that an exhibit is authenticated by "evidence sufficient to support a finding that the matter in question is what its proponent claims." See also *United States v. Natale*, 526 F.2d 1160, 1173 (2d Cir. 1975), *cert. denied*, 425 U. S. 950 (1976). Here, the testimony of Mandel and Zaknich more than met this requirement.

The defendants claim that the foundation laid by the testimony of Mandel and Zaknich did not demonstrate a continuous chain of custody for the tape recordings. However, this argument incorrectly assumes that demonstration of a chain of custody is a prerequisite to the admissibility of tape recordings. As this Court has recently noted in an opinion not cited by the defendants, there is no "statute or court rule" requiring that chain of custody be established as to tape recordings. *United States v. Steinberg*, 551 F.2d 510, 515 (2d Cir. 1977).\*

The defense also claims that the Government failed to establish that the tapes in question were not erased, rerecorded, or tampered with. Although the tapes were available to the defense for months before the start of trial, the defense never sought to have the tapes tested, and when the tapes were offered never objected on the ground that the tapes may have been altered. The failure to object on this specific ground waived any claim of error on appeal. Fed. R. Evid. 103(a)(1).\*\*

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\* Although no rule requires that chain of custody be shown for tape recordings, the District Court would not permit the tapes to be admitted without a showing as to chain of custody. Accordingly, the Government elicited testimony demonstrating the chain of custody. (A. 1224-28).

\*\* Prior to the start of trial, the court ordered the Government to prepare a compilation of the exhibits it intended to offer, and ordered the defense to file its objections to the intended exhibits. With respect to the tapes here in question, the defendants' only objections were to audibility (see Arkin Memorandum of Objec-

[Footnote continued on following page]

Moreover, defendants' argument blithely assumes that although they never suggested the possibility of tampering, the Government was required to produce some evidence that there were no alterations. The law is to the contrary. To object on the ground that tampering occurred, the defendants were required to present some evidence to support the objection. *United States v. Chiarizio*, 525 F.2d 289, 295-96 (2d Cir. 1975).

The cases relied on by defendants as requiring exclusion of this evidence are all inapposite. In each of those cases, the tapes were created either by the Government or a party to the litigation in anticipation of litigation. For example, in *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), the tape recording in question was generated by a Government informant wearing a body recorder who had "unusually strong motivations to shade his testimony in the Government's favor." 515 F.2d at 119. In *United States v. Knohl*, 379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973 (1967), the tape in question was a rerecording of a lost original, taped by a potential witness in a criminal investigation whose cooperation was being obstructed by the target of the investigation. In *United States v. McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), the tape was of a conversation between the defendant and a trial witness, the tape having been created by the defendant after he had been indicted. In contrast, the tapes at issue here were created years before any lawsuits were ever contemplated, and made in furtherance and in the normal course of AMREP's business.

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tions dated October 8, 1976, Appendix A, p. 8) and that the transcripts were not evidence (see Lauer Affidavit dated September 21, 1976, Exhibit A, p. 8). At trial, the objection was that the tapes could not be played before they were connected to a victim called as a witness (see Fleming Evidence Memorandum dated November 12, 1976). No objection similar to the one now raised was raised below.



As previously noted, the appropriate standard for determining the authenticity of these tapes is Rule 901 of the Federal Rules of Evidence. Rule 901(b)(4) illustrates the example of authentication relevant to this situation:

"(b) Illustrations. By way of illustration only and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal pattern, or other distinctive characteristics, taken in conjunction with circumstances."

The tapes in issue here clearly had distinctive characteristics. They were created pursuant to a regular policy of AMREP to record dinner presentations and sales meetings; the tapes were regularly forwarded to the home office in New York where they were kept; the speakers on the tapes were identified (see Rule 901(b)(5)); the speakers were corporate agents whose job was to do what is reflected being done on the tapes; the tapes contain internal references to the date and place of occurrence (A. 10530, 10536, 10537, 10549, 10553, 10560) and the name of the speaker (A. 10538, 10547, 10555, 10564); and the overall substance of the tapes themselves coincide with independent proof offered at the trial. With respect to the sales meeting (GX 669A), Mandel and Zaknich testified that they, as well as Hollander, conducted such meetings for the purpose of training and motivating the sales force. That is clearly what is happening on the tape. With respect to the dinner presentation (GX 671A and B), the testimony was that it was basically the same as dinner presentations personally attended by witnesses. Moreover, a comparison of that tape with the scripts of the dinner presentations in evidence (GXs 314, 315, 316, 317; A. 10246, 10258, 10274, 10298) shows the basic identity.

In sum, it must be remembered that the authenticity of tape recordings is within the discretion of the trial court. In language wholly applicable to the instant case, the court in *Stubbs v. United States*, 428 F.2d 885, 888 (9th Cir. 1970), *cert. denied*, 400 U.S. 1009 (1971), stated:

"[W]hether the recording as a whole is trustworthy is largely within the sound discretion of the trial judge. In the present case, the judge was satisfied that the location, approximate date, and principal speakers had been identified, and that the recording as a whole was accurate and sufficiently complete. We find no abuse of discretion in this respect."

Under the circumstances of the tapes' production in court, their internal patterns and substance, and the independent evidence supporting the genuineness of the tapes, the District Court did not abuse its discretion in determining that the authenticity of the tapes was sufficiently established.

## **B. Nine Letters Were Properly Admitted In Evidence**

The defendants claim that nine hearsay letters were improperly admitted in evidence. The letters can be divided into three groups: 1) five letters by Albuquerque realtors to Rio Rancho purchaser-witnesses; 2) two letters by relatives of purchaser-witnesses to AMREP; and 3) two letters by an employee of Harmon O'Donnell & Henninger to AMREP officers.

### **1. Letters by Albuquerque Realtors**

Before turning to the admissibility of the letters written by Albuquerque realtors, it is important to note at the outset that before the Government offered these ex-

hibits, the defendants had offered into evidence documents of the same nature in support of their theory of the case. Specifically, during the cross-examination of Geneva Clymer, a Rio Rancho purchaser, the defense elicited the fact that she had written to the Albuquerque Chamber of Commerce inquiring about Rio Rancho (DX EX), and that the written response she received was favorable (DX EY). Exhibit EY is exactly the same kind of document as the letters in issue, in that it contains an out-of-court declarant's evaluation of Rio Rancho Estates. The Government objected to the exhibit on hearsay grounds, but the objection was overruled. (A. 5388-90). Thus, defendants' objection to the admission of equivalent documents in support of the Government's case fails to account for the fact that they themselves opened the door to this kind of proof.

In any event, the five letters offered by the Government were properly admitted into evidence or alternatively, their admission constituted harmless error. With respect to two of the five letters in this group, Exhibits 129j and 1309a, the defendants have failed to specify in their brief how the admission of either document was improper or prejudicial. Exhibit 129j (A. 10152) is a letter from a Paul Heinz to a purchaser-witness, at a time when Heinz was working for Rio Rancho Estates. Accordingly, the letter was admissible under Rules 801(d)(2)(C) and (D), Fed. R. Evid., as an admission of a party-opponent. *United States v. Iaconetti*, 540 F.2d 574, 577 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3463, *reh. denied*, 45 U.S.L.W. 3587 (1977). Exhibit 1309a (A. 10799) is merely a realtor's expressing a willingness to list Rio Rancho property and contains nothing that is conceivably prejudicial to the defendants, so any error due to its admission into evidence would clearly be harmless.

The remaining three letters, Exhibits 129a, 129e and 129h (A. 10145, 10149, 10151) were responses by realtors



to letters written by one purchaser-witness, Dr. Adam Sporzynski. Assuming *arguendo* that the letters should not have been admitted,\* there was no prejudice to the defendants since these letters were cumulative of compelling independent evidence of the absence of a resale market. Ronald Williams, who had been affiliated with the Albuquerque Board of Realtors, testified that the Multiple Listing Service of the Board had 690 Rio Rancho listings between 1971 and 1973, and that there were approximately 20 sales. (A. 5224-25). He testified that, by the end of 1973, so many requests were being received concerning attempts to resell Rio Rancho land, that forms were prepared (A. 5226-34) (GXs 817a and 817b; A. 10660, 10661) which read:

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\* The defendants anticipate the Government's reliance on Rule 803(24) to justify admission of these three letters. There was no such reliance at trial. The Government concedes that there was not strict compliance with all the requirements of that Rule. Yet, we submit that such failure to strictly comply with the dictates of Rule 803(24) did not materially affect the trustworthiness of the letters, and therefore the court properly exercised its discretion in admitting these particular letters.

There were compelling circumstantial guarantees of trustworthiness. First, the court only allowed in evidence those realtors' letters which were shown to be in response to inquiries to that realtor by the purchaser testifying, thereby indicating that the letter was genuine (A. 5499-5503). Second, the trustworthiness of the letters was circumstantially guaranteed by the compelling logic that a realtor would have no motive to state that there was no resale market unless that were true, since it would be against his pecuniary interest to discourage a potential real estate sale if one could be consummated.

The defendants surely had sufficient time to counter the import of these letters, since the trial lasted another three weeks, and defense counsel had an adjournment of the trial after the Government rested during which they traveled to Albuquerque to interview witnesses, during which time they surely could have confronted these realtors with their past assertions, were there any doubt about the validity of the letters. See *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3807 (2d Cir. May 25, 1977).

"For your information, our records reflect that there is little, if any, local market for resales of tracts in this particular subdivision."

Peter Olguin, who had been in the real estate brokerage business in Albuquerque from 1969 through 1976, similarly testified that there had not been any resale market for Rio Rancho land in Albuquerque in all the years he had been in the real estate business. (A. 5194).\*

Moreover, the defendants incredibly fail to mention the proof that AMREP itself knew that little or no resale market existed. In its letters to purchasers inquiring about resale, the company stated that:

"We do sincerely believe that listing your property at this time with a local broker is premature for it is still too early for a local resale market to have developed." (GX 149h).

Such statements appeared in the company's letters from at least 1968 through 1973. (GXs 149h, 158e, 645, 652, 655, 1310c; A. 10203, 10206, 10515, 10517, 10519, 10800). In addition, in its SEC filings, AMREP stated that resale was difficult. (GXs 395, 402, 409A, 410; A. 10394, 10406, 10412, 10417).

In view of this independent evidence of the absence of any resale market, most of which the defendants conveniently ignore in claiming prejudice, the admission of the three letters in issue was clearly harmless error, since no prejudice inured to the defendants. *United*

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\*The defendants totally ignore this most salient piece of Olguin's testimony, focusing instead on his connection with the 1975 auction of Rio Rancho land, which, incidentally, they mischaracterize as having taken place after the FTC complaint had been made public. Olguin's testimony was very clear that there was no adverse publicity about Rio Rancho before the auction. (A. 5164, 5189).

*States v. White*, Dkt. No. 76-1511, slip op. 3049, 3055 (2d Cir. April 19, 1977).\*

## 2. Letters by a Witness' Relatives

When William Finnen, a Rio Rancho purchaser, was testifying, the Government offered two handwritten letters (GXs 107b and 107i; A. 10124, 10130) which Mr. Finnen identified as having been written by his wife and sister-in-law, respectively (A. 1653), with whom he was jointly making payments on the land. The letters were written and sent to the company \*\* and stated that difficulty was being encountered in trying to resell their land. The company wrote back on both occasions, the first time acknowledging the Finnens' difficulty in selling their land

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\*In addition, there was no prejudice to the defendants because they invited this type of evidence by claiming that not only did the Government have to prove that the scheme was intended to defraud purchasers, but that purchasers were actually defrauded. The defendants claimed, at trial, that an issue existed as to whether the alleged scheme had the capacity to defraud, and therefore, citing *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-82 (2d Cir. 1970), incorrectly argued that the Government had to show that customers were actually defrauded. (See Fleming Evidence Memorandum dated November 12, 1976). Under that theory, the Government had to show, which it did, that Dr. Sporzynski purchased the land for investment pursuant to AMREP's representations (A. 5481-82, 5489), and that he was defrauded when he found out that he could not sell his land. The only way to show that Dr. Sporzynski believed he had been defrauded was to offer in evidence the three letters in issue, which informed him that the land he had purchased as an investment was worthless since it could not be resold. Accordingly, the letters were not hearsay because they went to Dr. Sporzynski's state of mind. That appears to be what Mr. Fleming was referring to when he agreed with the court that the letters were not "admitted for the truth of the declarations." (A. 5505). The defendants should not be heard to complain now about the admissibility of these letters which would have been admissible as non-hearsay statements under their theory of the Government's burden of proof.

\*\* A fact conveniently ignored in defendants' brief.



(GX 107c; A. 10129) and the second time telling Mr. Finnen to hold on to his property because its value was always increasing. (GX 107j; A. 10131). No objection was raised to Exhibits 107c and 107j.

The Government offered the handwritten letters not for their truth, as claimed by defendants on appeal, but to show that the defendants were on notice \* that resale of Rio Rancho land was difficult (A. 1656), in spite of which the defendants continued to make their good investment representations. Since the two letters here in issue were not offered for their truth, but rather to show notice, they were properly admissible as non-hearsay statements.

### **3. Katzenberg Letters**

These are two letters (GXs 976 and 933; A. 10684, 10692) between Harmon O'Donnell & Henninger and Rio Rancho Estates setting forth the former's proposal for work to be done for Rio Rancho. They were offered because they showed Herman Oberman's involvement in retaining Harmon O'Donnell. There is nothing in either letter which is in any way prejudicial to the defendants who were convicted, and the defendants point to no prejudice.

### **C. The Statements Of Corporate Employees Were Admissible Against All Defendants**

A number of written and oral statements made by a corporate defendant's agent or employee during that agency and concerning matters within the scope of that agency or employment were admitted into evidence

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\* Exhibits 107b and 107i were documents in the company's possession, having been produced pursuant to Grand Jury subpoena.

against all defendants. The defendants concede that such statements were admissible as evidence against the corporation (AMREP Br. 76) but assert that such statements were still not statements of the corporation and should not have been admitted against the individual defendants. The argument is without legal foundation. The statements were admissible directly against the individuals under Rule 801(d)(2)(D), Fed. R. Evid., and also as declarations by the corporate co-conspirators under Rule 801(d)(2)(E).

It is well settled that statements by one conspirator in furtherance of the conspiracy are admissible against all other co-conspirators even if they were unaware of the existence of the statement as long as a preponderance of the independent evidence established that they joined the conspiracy. *United States v. Stanchich*, 550 F.2d 1294 (2d Cir. 1977); *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1970). See *United States v. Wiley*, 519 F.2d 1348 (2d Cir.), *cert. denied*, 423 U.S. 1058 (1975); *United States v. Bynum*, *supra*, 485 F.2d at 496; *United States v. Cohen*, 145 F.2d 82 (2d Cir.), *cert. denied*, 323 U.S. 799 (1944). This principle is equally applicable where the statements offered against other conspirators are those by a corporate co-conspirator. *Schine Chain Theatres Inc. v. United States*, 334 U.S. 110 (1948); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *United States v. Imperial Chemical Industries, Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951). This concept was applicable here since a scheme to defraud when joined in by more than one person is a conspiracy. *United States v. Pinkerton*, *supra*, 328 U.S. at 647; *United States v. Cohen*, 516 F.2d 1358 (5th Cir. 1975); *United States v. Grow*, 394 F.2d 182, 203 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); *Silkworth v. United States*, 10 F.2d 711 (2d Cir.), *cert. denied*, 271 U.S. 664 (1926).

The defendants' attempt to distinguish such cases because they involved civil conspiracies (AMREP Br. 76 note) is unconvincing and without authority. Rule 104 (a), Fed. R. Evid., "makes no distinction as to the basis for deciding preliminary questions of admissibility as between civil and criminal cases." *United States v. Stanchich*, *supra*, 550 F.2d at 1294 n. 4. This Court in *Stanchich* reaffirmed the *Geaney* principle that the preponderance of evidence standard—a civil case rule—governs the admissibility of co-conspirator statements. Defendants fail to cite any case which distinguishes civil from criminal conspiracies on the issue of the use of co-conspirators' statements, nor have we been able to find any. The Supreme Court in *United States v. United States Gypsum Co.*, *supra*, 333 U.S. at 393 n. 10, relied upon criminal cases to reach its conclusions about such statements, and in criminal cases, the courts have approved the use of a corporate conspirator's employee's statements against all other co-conspirators. *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *Continental Baking Co. v. United States*, 281 F.2d 137, 151 (6th Cir. 1960); *American Tobacco Co. v. United States*, 147 F.2d 93, 118 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1945).

Appellants seek to sidestep these principles by suggesting that an employee's statement under Rule 801(d)(2)(D) is not a statement "of" the corporation but merely one admissible "against" it. (AMREP Br. 76). However, the plain meaning of the Rule is to the contrary, since it defines such statements as substantive admissions "by" the principal and therefore not hearsay when introduced by a party opponent.\* A corporation, of

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\* Rule 801(d)(2)(D) finally codified the trend of authority and eliminated the need to show specific authority to make the statements. Compare *Northern Oil Co. v. Socony Mobil Oil Co.*,

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course, cannot act or speak, except through its employees or agents. When corporations conspire together they can only do so through the words or deeds of their employees or agents. Cf., *Continental Baking Company v. United States*, *supra*.

While the defendants seem to abandon the contention advanced in the District Court that corporate officers cannot conspire with their own corporations,\* they suggest that each employee or agent of the corporation must be a *member* of the conspiracy before his acts or declarations are admissible against his principal and then against other co-conspirators. Certainly this is not so with respect to an employee's or agent's own principal under Rule 801(d)(2)(D). Therefore all acts or declarations by that principal—including those of employees and agents—are admissible against the other conspirators when in furtherance of the conspiracy. In *Schine Chain Theatres, Inc. v. United States*, *supra*, inter-office letters and memoranda of co-conspirator distributors were admitted against the *Schine* conspirators—who were both

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347 F.2d 81 (2d Cir. 1965). All that is required now is a showing that the agent is still employed by the principal and that the statements concern matters within his role as agent. See 4 Weinstein's Evidence ¶ 801(d)(2)(D)[01] at pp. 801-14-15, and 137, and cases discussed therein. See also the Notes of the Advisory Committee on Rule 801, Fed. R. Evid., 28 U.S.C.A.; *United States v. Kahn*, 472 F.2d 272, 289 n.21 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

\* This is clearly not the law where as here officers and directors of public corporations are involved. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Schine Chain Theatres, Inc. v. United States*, *supra*; *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1950); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1950); *United States v. Bridell*, 180 F. Supp. 268, 273 (N.D. 11d 1960); *United States v. Kemmel*, 160 F. Supp. 718 (M.D. Pa. 1958); *United States v. Imperial Chemical Industries, Ltd.*, *supra*. See *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *United States v. Kahn*, *supra*.

corporations and individual officers—and there was no suggestion by the Court that the individual authors of these documents were themselves co-conspirators. 334 U.S. at 117. In *United States v. United States Gypsum Co.*, *supra*, corporate agreements and bulletins were held to establish the conspiracy, thereby admitting the acts and declarations by the various conspirators against all other members. 333 U.S. at 393. Contrary to the defendants' suggestion (AMREP Br. 76 note), a careful reading of the opinion makes clear that declarations of corporate employees were considered statements by a corporate member of the conspiracy. See *Continental Baking Co. v. United States*, *supra*.\*

The defendants' claim that the admission here of statements by a corporate conspirator's employees and agents was improper is particularly misplaced since the individual defendants were the founders, principal officers and largest stockholders in the defendant companies. Indeed, these individual defendants formed and then used these corporations for the purpose of carrying out their scheme to defraud. The illogical, non-sensical but necessary result of the defendants' contentions would be to prohibit most, if not all, of the actions and declarations of corporate employees when these were the primary vehicle by which the defendants furthered their scheme.

The defendants single out statements of Herman Oberman and Bob Walsh as particularly objectionable. In 1965, AMREP and Rio Rancho Estates hired Harman, O'Donnell & Henninger Associates, Inc., to prepare a

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\* Moreover, under Rule 801(d)(2)(D), an employee's or agent's statements are admissible as those of an *individual* as well as a corporate principal. In the instant case, at a minimum the more significant corporate employees and agents were agents of one or all of the individual defendants and therefore their statements are admissible directly against the individual defendants.

master plan and land use evaluation for Rio Rancho and to evaluate the effect of Albuquerque's growth and the national sales market on Rio Rancho. (GX 983, 983A; A. 10692-95). The agreement was signed by John Sommerhalder, a Rio Rancho assistant vice-president. (A. 10695). Herman Oberman, an AMREP consultant, major shareholder, and past President and director, and Bob Walsh, a local engineer who was consulting for Rio Rancho (A. 4797) were actively involved on behalf of AMREP in working with Harman, O'Donnell & Henninger on this property and Chester Carity was consulted about this project (GX 972, 974, 976, 983, 983A, 984). Ralph Avellanet, testified for the Government as the person assigned to perform the study for Harman, O'Donnell & Henninger.

Both Sommerhalder and Walsh told Avellanet what the patterns of growth for Albuquerque were, in order to assist Avellanet plan and analyze for Rio Rancho how to maximize the effective use of its land and determine Albuquerque's effect on that use. (A. 4806-14). Clearly, such statements by corporate agents are admissible against the corporations under Rule 801(d)(2)(D) and since in furtherance of AMREP's efforts to maximize its Rio Rancho sales efforts, against all defendants under Rule 801(d)(2)(E).\*

In November, 1965, Harman, O'Donnell & Henninger sent Rio Rancho its preliminary conclusions (GX 973; A. 10687) stating that Albuquerque was not growing toward Rio Rancho and for at least twenty years would have little effect on Rio Rancho. These preliminary con-

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\* It is not unreasonable, as the defendants suggest, to infer in light of *all* the evidence in the record that if Rio Rancho's engineering consultant and an assistant vice-president knew about Albuquerque's direction of growth, so did the individual defendants.



clusions were discussed at a December, 1965, meeting attended by Oberman, Sommerhelder and Avellanet. In order to develop the final report, Avellanet also needed to know "what was the likelihood of national lot buyers coming to that property to live." (A. 4820). Oberman, on behalf of Rio Rancho, gave Avellanet "a rundown of the operating assumptions, the operating framework with which Rio Rancho operations were carried out," \* which included the fact that only about 5% of the national buyers would ever move to Rio Rancho. (A. 4820).\*\* These statements by Oberman on behalf of Rio Rancho certainly furthered the effort to get a useful report from Avellanet and were clearly admissible under Rules 801(d)(2)(D) and (E). These statements also tend to establish the existence of a conspiracy even if only used against Oberman.\*\*\*

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\* These assumptions were based in part on the company's experience in a Florida subdivision where it sold 18,000 lots in six years, but only built 300 homes. (A. 4820).

\*\* The defendants did not object to these statements of Oberman's. Later, after Oberman's motion for a judgment of acquittal was granted, defense counsel, in connection with a motion for a mistrial, contended such evidence was not admissible against any defendant, declining to say whether it was admissible against the corporation. (A. 6245).

\*\*\* The Government contends that Oberman was a co-schemer as well and that his statements are also admissible directly under Rule 801(d)(2)(E). Since Judge Metzner did not explain the judgment of acquittal of Oberman (A. 6217), there is no way to tell if it was based upon insufficiency of the evidence or upon Oberman's assertion that by retiring in 1969-70 he had withdrawn from the conspiracy before the running of the statute of limitations (A. 6119-25). Moreover, even if the acquittal were based upon insufficiency of evidence, Oberman's statements are still admissible as those of a co-schemer. As this Court recently held, the standard for dismissing a conspiracy count is whether "a reasonable man may fairly conclude guilt beyond a reasonable

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Defendants also point to a few additional exhibits which they contend were improperly admitted. These claims are frivolous since these too are all admissions of the corporate defendants in furtherance of the conspiracy or which tend to establish its existence. For example, exhibit 893A shows that the company could not honor its exchange privilege promise for a time, because it only had lots in Corrales Heights, lots which were smaller and which cost the customer additional money.

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doubt," *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972), while the lower preponderance of the evidence test governs the admission of conspirators' declarations. *United States v. Stanichich*, *supra*. The evidence well supports the finding that Oberman was a co-schemer.

Oberman was a founder of AMREP and remained a principal shareholder. In 1961, as President and director of AMREP, Oberman signed the contract to buy 54,000 acres of land for Rio Rancho. (GX 612, 613). At this time, AMREP told the State of New York it was promoting sales of lots as an investment (GX 455), and told the S.E.C. that it did not know what effect the growth of Albuquerque would have on Rio Rancho (GX 400B). He was familiar with the AMREP's sales theory that Albuquerque was penned in on three sides (GX 2181), and with the major Rio Rancho promotional brochures (GX 604). He acted for AMREP in its dealings with Harman, O'Donnell and Henninger and showed a familiarity with the Rio Rancho sales efforts. He gave the consultants a summary of AMREP's operating assumptions including the fact that AMREP only expected 5% of its customers to ever move since "We sell dreams." He also knew that Rio Rancho lots were not a good investment and its growth potential was falsely represented since the consultant's final report told him that Albuquerque was growing fastest in areas other than to the northwest and would continue to do so, and that Albuquerque's growth would have little, if any, effect on Rio Rancho. Finally, although he knew Rio Rancho lots were sold as a good, safe investment, in 1969 he negotiated AMREP's purchase of an additional 31,000 acres for about \$2 more per acre than the purchase of the original acreage, thus postponing indefinitely the remote chance for previous purchasers to resell their lots.

It, like GX 872, shows how the company treated customers whose expectations from company representations did not turn out correct. Finally, GX 657, a memo from the head of Rio Rancho public relations to the head of AMREP advertising, is an attempt to explain why Rio Rancho had so much difficulty selling its homes in the Albuquerque area, so that Rio Rancho would be better able to target its prospective home customers. The defendants fail to point out that a copy of this memorandum was sent to Chester Carity.\*

In summary, each of the statements or exhibits complained of was properly admissible into evidence and could be used by the jury against all defendants under well-settled principles of conspiracy law. Nothing about the use of this evidence in this case was in any way improper.\*\*

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\* For a discussion of the tape of the Hollander training session see *infra* at 118-19.

\*\* In fact, since this evidence involved past or present employees of AMREP, all closely tied to the interests of AMREP and most certainly more within the defendants' control than the Government's, the jury could properly have asked themselves why the defendants did not call any of these individuals, including Oberman, on their own case to either explain or refute any of this evidence. *United States v. Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). Therefore, to the extent they now claim an inability to meet or explain the Government's properly admitted proof, their objections are particularly baseless.



## POINT V

**Defendants Were Not Prejudiced By The Evidence of Sales Techniques.**

Carity and Daniel Friedman argue that they were prejudiced by evidence of allegedly isolated sales efforts which were unauthorized or which contradicted company policy. (Br. 40). Specifically, they claim that error was committed in the receipt of a "flood" of "idiosyncratic" sales conduct and two exhibits: GX 315, a script for sales dinners, and GX 669, a tape of a training session of salesmen. Of the examples of sales conduct cited (Carity Br. 19-21), all were either stricken on motion of the defendants, not objected to by defendants, or related to a supervisory corporate official and consistent with the general AMREP sales scheme and thus admissible as statements in furtherance of the scheme. Defendants' claim that they were denied a fair trial, therefore, is without merit.

The defendants object to a dinner party script, GX 315, on the grounds that it was only used for four months and could not have been part of a common scheme because it stated Albuquerque was "ready to fall right into Rio Rancho" and "your investment has resale value" since Rio Rancho will be sold out in eighteen months. This script was prepared by Lou Koniecke, worked on by Carity \* and used at ATC dinner parties in 1965 when the dinner party program commenced. (A. 852-54). No matter how long it was used, the script was probative both of the existence of the scheme to defraud, and of Chester Carity's knowledge, intent and participation.

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\* Carity worked on other scripts as well, for example GX 316. (Mandel, A. 855-863).

Since there was independent evidence of the other defendants' participation in the scheme, the script also was admissible against them as well.

Moreover, the statements in this script were not aberrational. The dinner presentations and literature always stressed that Albuquerque was "bursting out the seams" and could only expand "precisely where Rio Rancho Estates is located." (GX 316; A. 10280; see also GX 317; A. 10304).<sup>\*</sup> Nor was it anomalous to state in 1965 that Rio Rancho soon would be sold out and that then there would be a resale market. There was overwhelming evidence that during the late 1960's and early 1970's purchasers were systematically advised at sales dinners and on tours that the property was almost sold out and that the company would soon set up a resale office (see *supra* at 16, 38-39).<sup>\*\*</sup> These representations were made by and at the direction of Leonard Geller and Peter Miller, the general managers of defendant ATC.

Defendants' objection to the tape recording of Sid Hollander, a regional sale manager, conducting a training session and sales meeting (GX 669A) is equally without merit. First, defendants did not object to intro-

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<sup>\*</sup> Indeed one of the dominant impressions left by defendants entire dinner party presentation was that Rio Rancho lots were selling and appreciating in value rapidly and the faster this occurred, the faster and more substantial were the profits to be made from selling the investment. Purchasers were led to expect a rate of return of 25% per year. (GX 671; A. 10561-62). Mrs. Bonavisa's testimony that she was told her commercial property would double its value in a short time (A. 2759) is entirely consistent with this overall sales presentation devised and authorized by the defendants.

<sup>\*\*</sup> In the face of this evidence, defendants' claim that the testimony of Mrs. Henry (A. 426-27, 431, 436, 464) and Mr. Finnen (A. 1627-28)—which they did not move to strike—reflected idiosyncratic and isolated sales conduct (Carity Br. 19) is without merit. Moreover, these representations were reaffirmed by defendant Rio Rancho Estates in form letters sent to purchasers. (See pp. 38-39 *supra*).

duction of this tape recording on the ground urged here\* and therefore are precluded from raising the issue on appeal. *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773 (2d Cir. April 11, 1977). Second, since it was clearly AMREP's policy to have such sales meetings periodically to criticize, train and motivate salesmen, (A. 891-932, 1186-87, 1217-18) the recording was admissible both to establish the scheme to defraud and as evidence in furtherance thereof.

The claims with respect to the other allegedly "idiosyncratic" proof are also disposed of readily. At the end of the defense case, defendants moved to strike certain salesmen's statements as not part of the common scheme to defraud. (A. 7336-74). The motions were granted in part (A. 7433-39), and several representations were stricken, including six sets objected to in this Court. (A. 1595; \*\* 1742, 1746-47, \*\*\* 2255-56; 2558, 2560, 2581; 5673-74, \*\*\*\* 5802). Judge Metzner thereafter asked the defendants to tell him what, if anything, they requested the District Court to tell the jury about the stricken evidence. (A. 7472). Since defendants never responded (A. 8017-18), they cannot now be heard to complain.\*\*\*\*\*

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\* At the time of its admission and at the time it was played, defendants made no objection other than to the origin of the tape. (See A. 1218-30, 1531-35). This was not sufficient to preserve the present point for appeal. *United States v. Bennett*, 409 F.2d 888 (2d Cir.), cert. denied, 396 U.S. 852 (1969).

\*\* The defendants did not move to strike A. 1549, but their motion to strike a similar statement (A. 1555) was granted.

\*\*\* The Greenberg testimony at A. 1742 was not stricken because there was no motion to do so. Other Greenberg references to luxury housing were stricken. (A. 1745).

\*\*\*\* The defendants did not move to strike Gray's other testimony (A. 5808, 5843-44) which in any event merely related back to A. 5802.

\*\*\*\*\* The stricken testimony, of course, was not referred to by the Government in its summation.



The remaining statements which defendant challenge were made by persons with sufficient responsibility, or were themselves so consistent with the common scheme, as to be admissible as acts in furtherance of the scheme or proof of its existence.

Thus, for example, Len Geller, the sales manager for ATC, and Dan Monaco, the AMREP tour director,—both also identified as co-schemers—gave a number of instructions to salesmen designed to minimize customers' access to possibly negative information, especially while on the tours.\* (A. 2154, 2161-62, 2193-95, 2339, 2363-64). These efforts clearly furthered the scheme to defraud.

The situation of Mr. Fox, who wanted to show his contract to his lawyer, was consistent with other evidence which established that sales people were trained to overcome this precise objection when raised by a purchaser.\*\*

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\* The record is clear that an essential element of the tours was to control what the people did. Other instructions to which defendants object also served this purpose and were given by the Rio Rancho property manager (A. 2967-71), or by the sales manager at Rio Rancho. (A. 3111, 3130-32). Some of this testimony was later stricken; compare A. 2154 with A. 2183; there were no motions to strike the rest.

\*\* The sales training tape, GX 669A, states:

... Because you know what's going to happen when dinner is over. You know when dinner is over and you start to fill this out, and then somebody's gonna say. "This is fine, but I want to think it over." Or "This is beautiful, but I can't afford it." Or "I'd like to talk to my lawyer." Or "I'd like to show it to my brother-in-law in Oshkosh." You know that they are going to say one of these things, don't you? Because you've heard it many times before.

Now if you know it's going to happen, is it not logical to overcome it at dinner before you get to it?... (GX 69A; A. 10541-42). (Emphasis added).

[Footnote continued on following page]

Moreover, Mr. Fox testified that it was the manager—a person whose conduct would bind the defendant ATC—who would not permit him to review the contract with his attorney.

As to the testimony of Mr. Mols that he was told Rio Rancho would be fully developed within twenty years,\* defendants did not move to strike this evidence at trial. Moreover, this was told to Mols by John Sommerhalder, the Vice President of Rio Rancho Estates, and as such was properly received as evidence in furtherance of the scheme.

Lastly, defendants complain about a statement by Mrs. Mohammed that she was told that her lot faced a golf course (A. 2602), and a statement by Mr. Mols that his salesman indicated that he also owned a commercial lot and was going to build a gas station on it next year. (A. 3851-52). Neither statement was asked to be stricken. Nor did the Government argue that the defendants should be convicted based on them. Even assuming that they reflect aberrant conduct, it is simply absurd to suggest that these defendants were convicted on the basis of these representations.

Finally, it merits note that defendants' overall claims of prejudice are greatly exaggerated. The evidence complained of all was at least generally consistent with the

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Nicholas Masone, an ATC salesman, who later became a sales manager, testified that he was trained by Leonard Geller, the general manager of ATC, how to overcome common objections, one of which was a purchaser's request to show the contract to an attorney (A. 2140-41).

\* The testimony as to the twenty year period was first elicited by the defendants on cross-examination of Mols (A. 3913-7), in what obviously was an effort to show that Mr. Mols was not anticipating a quick profit. Defendants, therefore, cannot complain now about the Government's efforts to clarify this matter on re-direct. (A. 3935-36).

thrust of defendants' sales representations and with the specific training practices of the company that emphasized carefully orchestrated, high-pressured and devious sales techniques. And, to the extent that any of this evidence suggested misrepresentations unrelated or unique to the scheme charged, any possible harm surely was cured by the trial court's careful instructions on the nature of the scheme and the effect of isolated misrepresentations.\*

## POINT VI

### **The Trial Court's Charge Was Correct In All Respects.**

#### **A. The Trial Court's Instruction On Corporate Criminal Liability Was Correct**

Defendants Carity and Daniel Friedman claim that the trial judge's instruction on corporate criminal liability improperly permitted the jury to impute criminal culpability to the corporate defendants based on unauthorized conduct of salesmen, and then to impute this conduct to the individual defendants. Taken together with what they describe as "idiosyncratic" evidence of isolated conduct by employees, defendants assert that the instruction

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\* The jury was charged that they must find beyond a reasonable doubt that

"a scheme existed to defraud purchasers of land at Rio Rancho, which included either a false claim as to the investment value of the purchase or a false claim to the direction and extent of the growth of Albuquerque". (A. 7970).

The Court also instructed that:

"[p]roof of an isolated misrepresentation alone is not sufficient to constitute a scheme to defraud." (A. 7968).

\* \* \* \* \*

"... mere puffing, exaggeration, enthusiasm or high-pressure salesmanship by itself does not constitute fraud." (A. 7969).



prejudiced them and requires reversal. In light of the District Court's charge, viewed in its entirety,\* and the compelling evidence in this record, it is inconceivable that the individual defendants were convicted on the basis of anything but their own conduct. Moreover, the instruction requested by defendants was incorrect as a matter of law.

Specifically, defendants argue that the court should have charged that a corporation cannot be found criminally liable for the acts of its employees *unless the employees first were proved guilty of fraud*. Plainly, this instruction was wrong when applied here, as sought by defendants, to the acts of salesmen and lower-level corporate employees. First, acts performed by such employees within their express or apparent authority were binding on the corporation and were competent proof of the corporation's fraudulent intent.\*\* Second, salesmen might not know of facts—known to the corporation—which disproved the accuracy of representations they were

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\* This Court repeatedly has recognized that the instructions to the jury cannot be dissected and analyzed sentence-by-sentence, but must be considered as a whole to determine if they are fair and adequate. *United States v. Birnbaum*, 373 F.2d 250, 262 (2d Cir.), *cert. denied*, 389 U.S. 837 (1967); *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *accord* *Cupp v. Naughten*, 414 U.S. 141 (1973); *United States v. Santiago*, 528 F.2d 1130 (2d Cir. 1976).

\*\* See, e.g., *United States v. Hilton Hotels Corporations*, 467 F.2d 1000, 1004-1007 (9th Cir. 1972), *cert. denied, sub nom. Western International Hotels, Co. v. United States*, 409 U.S. 1125 (1973); *United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174, 204-205 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *United States v. Carter*, 311 F.2d 934, 941-944 (6th Cir.), *cert. denied, sub nom. Felice v. United States*, 373 U.S. 915 (1963); *United States v. Standard Oil Company of Texas*, 307 F.2d 120, 127 (5th Cir. 1962); *Continental Baking Co. v. United States*, *supra*, 281 F.2d at 149-151; *United States v. Steiner Plastics Mfg. Co., Inc.*, 231 F.2d 149, 153 (2d Cir. 1956); *United States v. George F. Fish*, 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946). See also, *J.C.B. Super Markets, Inc. v. United States*, 530 F.2d 1119, 1122 (2d Cir. 1976).

instructed and trained to make. Nevertheless, the fact that such representations were made, clearly was admissible to establish the fraudulent scheme and the corporation's intent, regardless of whether the individual employee himself was guilty of fraud. Here, as we have extensively set forth above, the corporate defendants' membership in the fraudulent scheme was proved by the acts and knowledge of officers at the highest level—the individual defendants themselves—and by the acts of lower level employees who carried out their instructions. Thus, the charge defendants requested \* was simply inaccurate—and in any event inapplicable—to the case at bar.

Moreover, Judge Metzner's charge, read as a whole, fairly protected defendants against the prejudice they now claim. The jury was properly charged that it had to find that each defendant knowingly and wilfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with intent to defraud. (A. 7967-68, 7971). In explaining this to the jury, the trial court further stated:

"[Y]ou may find that a defendant acted knowingly and wilfully if he acted voluntarily and purposefully and with specific intent to do something which the law forbids, that is to say, that he must have acted with evil motive or bad purpose to disobey or to disregard the law and not because of negligence, mistake, inadvertence or other innocent reason." (A. 7971).\*\*

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\* Nowhere in either the defendants' request to charge No. 14 (A. 8218-20) or in any other request, was the court specifically asked to instruct the jury in the precise words now urged.

\*\* Contrary to the defendants' suggestion it is clear that this charge applied equally to both individual and corporate defendants.

Almost immediately following the portion of the charge on intent, the jury was instructed on the issue of corporate criminal responsibility. In this regard the court stated:

"[y]our problem, of course, is to determine whether this corporation [AMREP, ATC and Rio Rancho] has done the things charged in the indictment by virtue of and through the acts of its officers, directors or its employees." (A. 7972).

The court then defined for the jury the scope of corporate responsibility with an instruction that a corporation is responsible for the acts and statements of such agents when made or performed within the scope of their express or apparent authority, and thereafter correctly explained these concepts.\*

The apparent authority charge given by the court did not divert the jury's attention from the issue of corporate responsibility, but was necessary to define and limit the scope of the acts of an employee for which a corporation may be held criminally responsible. Acts, while they may be contrary to actual instructions and even unlawful, must be within the scope of the employees' express or apparent authority. In this regard the charge was proper. See *United States v. American Radiator & Stand. San. Corp.*, *supra*, 433 F.2d at 204-205; *Con-*

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\* "A corporation is held responsible for the acts and statements of such persons when such acts and statements are performed or made within the scope of their express or apparent authority, and this responsibility exists even though such statements or actions are in violation of law.

"It is not necessary for a finding of such authority that an officer, director or employee be specifically authorized or instructed to commit the particular acts or make the particular statements. Apparent authority is the power an outsider would normally assume a person would possess judging from his position and the general scope of his known functions." (A. 7973).



*tinental Baking Company v. United States*, *supra*, 281 F.2d at 249-251.

Finally, Judge Metzner expressly told the jury that individual and isolated "misrepresentations" were not proof of the scheme to defraud. (A. 7968). Thus, defendants' claim that they were mistreated by the trial court's charge on corporate criminal responsibility is wholly without merit.

**B. The Trial Court Properly Charged The Jury That A Belief In Ultimate Success Does Not Excuse Fraudulent Conduct**

The trial judge instructed the jury that:

"No amount of honest belief on the part of a defendant that the enterprise will ultimately succeed and that no one would suffer any loss excuses fraudulent actions." (A. 7974).

The defendants maintain that this was error. They argue, first, that their good or bad faith belief in ultimate value was the entire issue, and second, that the charge was internally inconsistent, because there can be no fraudulent intent "absent an intent to cause a victim permanent pecuniary injury." (Carity/D. Friedman Br. 49). These arguments are without merit.

The defendants' assertions of good faith must be tested against the representations made to purchasers and upon which the purchasers relied when deciding to buy lots at Rio Rancho. The real issue for the jury, therefore, was the defendants' good or bad faith belief in these representations and not a good or bad faith belief in some "ultimate value."

Nonetheless, the defendants appear to be arguing that an honest belief in some undefined "ultimate value" ex-

cuses the making of representations and promises known by them to be false and misleading. This type of ends-justifies-the-means argument contradicts all notions of honest dealing and good faith, and it is axiomatic that such a belief is simply no defense to otherwise fraudulent and misleading representations and promises. *United States v. Diamond*, *supra*, 430 F.2d at 691-92; *United States v. Sparrow*, 402 F.2d 826 (10th Cir. 1968); *United States v. Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); *United States v. Tellier*, 255 F.2d 441, 449 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *Frank v. United States*, 220 F.2d 559, 564 (10th Cir. 1955); *Foshay v. United States*, *supra*, 68 F.2d at 210.

Nor can the defendants sidestep the weight of this authority by arguing now, as they did to the jury, that the representations made as to value were in fact only representations as to some future "ultimate value" whose time has not yet come. This jury argument, which was contrary to the evidence and clearly rejected by the jury, demonstrates no error in the judge's charge.

Lastly, citing this Circuit's decision in *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1969), the defendants seem to suggest that even if they did misrepresent the value of lots at Rio Rancho, a good faith belief that no one would suffer *permanent* pecuniary injury precludes an intent to injure, which they argue the Government must establish in order to prove fraudulent intent. In *Regent Office Supply* this Court held that while it was not essential that the Government allege or prove that purchasers were in fact defrauded, it was incumbent upon the Government to show that "some actual harm or injury was contemplated by the schemer." 421 F.2d at 1180. See also *United States v. Dixon*, *supra*, 536 F.2d at 1398-1401. The defendants would equate

the "actual harm or injury" contemplated by *Regent Office Supply* with permanent pecuniary loss. However, in *Regent Office Supply*, this Court stated that all that was required was "some actual injury to the victim, however slight." 421 F.2d at 1182. *Regent Office Supply* neither requires that the injury be permanent nor that it be of a pecuniary nature. Furthermore, this Court has recently indicated that non-pecuniary injury can itself be sufficient to support a mail fraud charge. *United States v. Dixon*, *supra*, 536 F.2d at 1398-99.

Furthermore, unlike here, the false representations made in *Regent Office Supply* were not directed to the nature and quality of the bargain being made. Rather they were directed to the reasons for being able to make the offer in the first instance. The Court found that, on the facts before it, no injury or harm was contemplated. The Court clearly distinguished false representations designed merely to obtain a listening ear from misrepresentations going to the heart of the bargain being struck.

The facts of this case fall clearly within the rule of law of *United States v. Rowe*, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932) as construed by the Court in *Regent Office Supply*. In *Rowe* the facts showed that the defendants, on the basis of gross misrepresentations of the value of certain pieces of land as well as a complicated structure of supporting false representations, had persuaded their victims to part with substantial sums of money in return for essentially worthless property. The fraud lay in the defendants' representations that the property was worth much more than they knew it was in fact worth. This Court in *Regent Office Supply* stated that this type of injury was very real and made itself felt in the victims' pocketbooks. 421 F.2d at 1181. The Court left no doubt that where false representations are directed to the quality, adequacy or price of the item itself or the benefits to be received from it, there is injury because the



victim has not received what he bargained for and fraudulent intent is apparent because the victim is forced to bargain without essential facts. 421 F.2d at 1182.

The testimony at trial disclosed that the twenty-three purchaser victims who testified for the Government had invested sums of money varying from a low of approximately \$1,000 to a high of approximately \$45,000. All twenty-three witnesses had purchased lots for investment purposes.\*

Here, like in *Rowe*, these people have not received what they bargained for and have parted with sizable amounts of money in the process. There can be no doubt that these people have already suffered a loss that is substantial and real.\*\* It is simply no defense to argue that the injury was intended to be temporary and not eternal.

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\* While some may have also been motivated by thoughts of possible retirement or relocation, even as to these, investment considerations played an important role in the decision to make the purchase.

\*\* Numerous victims testified that they were unable to resell their property as they had been led to believe they would be able to do. See pp. 58-61, *supra*. Two victims, Mrs. Clymer and Mr. Kaufman sold property at auction at a substantial loss. (A. 5384-5; A. 5328). One victim, Mr. Gray, testified that after his resale efforts failed, he voluntarily discontinued his monthly payments and forfeited fifteen thousand dollars to Rio Rancho. (A. 5810-11).

## POINT VII

### **Defendants' Conviction On Counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64, 67, 71-73, 75 and 79 Were Proper.**

Defendants challenge their convictions on certain specific counts, contending with respect to the mail-fraud Counts 7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67, that the Government failed to prove a mailing, and with respect to the Interstate Land Sales Counts 71, 72, 73, 75 and 79, that there was insufficient proof of the use of interstate commerce. Additionally, they argue as to Count 36 that the Government failed to prove that the mailing was caused by any co-schemer or that it was in execution of the scheme. These claims do not withstand analysis.

#### **A. The Thirteen Mail Fraud Counts (7, 10, 21, 22, 23, 28, 29, 35, 36, 44, 61, 64 and 67)**

At trial, the Government proved by both circumstantial and direct evidence that the mailings referred to in the challenged counts \* in fact had been made on or about the dates set forth in the indictment.

Lawrence Perlmutter, AMREP's Chief Administrative Officer, testified to the business practice of AMREP and Rio Rancho to have customers mail monthly payments to the Chemical Bank in New York

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\* Defendants do not attack on this ground their convictions on mail-fraud Counts 11, 26, 40, 41, 46, 58, and 68. Accordingly, under the concurrent sentence doctrine, this Court need not reach the disputed counts with respect to the individual defendants, assuming that all other issues are resolved against them. See, *United States v. Mejias*, Dkt. No. 76-1384, slip op. 2269 (2d Cir., March 10, 1977).

in pre-addressed envelopes provided by the company (A. 3302-03). All but two of the challenged-count witnesses testified that the payment or letter constituting the count mailing was "made" or "sent" either to Chemical Bank or to Rio Rancho, and the Government offered into evidence a cancelled check, a Rio Rancho statement of account, a reply letter or an envelope bearing a postmark and cancelled stamp as additional proof of the mailing.\* Viewed together, the testimony of Perlmutter,

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\* William Finnen (Count 7), testified that his payments from Bellmore, Long Island were made "to a bank in New York by envelopes provided by the corporation." (A. 1642). GX 107A, a Rio Rancho statement of account, established receipt by Rio Rancho of the payment referred to in Count 7 (A. 1642-43). Morris Gusowsky (Count 10), identified GX 110L (A. 4025, 10132) as an envelope to the Chemical Bank with his Staten Island return address on it and which bore a date stamp marked "Received May 10, 1971." The envelope was postmarked April 30th, Staten Island, and its postage stamp had been cancelled. Gusowsky's identification of this envelope, its introduction into evidence and the reading of the receipt notation, together with the witness' testimony as to his normal practice of making all payments at that time period, were more than sufficient to justify a finding of mailing with respect to this count. Defendants' claim that the jury had not physically viewed GX 110L is thus much beside the point.

Richard Gray (Count 21), testified that his payments from Buffalo, New York, were made by personal check in the envelope provided, to Chemical Bank in New York (A. 5799, 5809-10). GX 121A and GX 121E, two Rio Rancho statements of account, reflected receipt by Rio Rancho of the payment mailing set out in the indictment. (A. 5810). Jack Morden (Count 22), from Queens, identified GX 122Y and GX 122X two cancelled checks, dated October 15, 1975, as those which he sent for his property to the Chemical Bank in New York (A. 5680-81). Helen Henry (Count 23), explained that it was her practice to send the monthly payments from New York City, New York to Rio Rancho in care of Chemical Bank, New York, in a pre-addressed envelope provided by the company (A. 469-471; *See also* GX 1237). James Davis (Count 28), from Port Jefferson, Long Island (A. 2547), testified that he sent GX 128I and GX 128J, (A. 2566), two can-

[Footnote continued on following page]



celled checks, both dated December 6, 1975, by mail, in an envelope provided by Rio Rancho, and addressed to the Chemical Bank in Manhattan. (A. 2566, 2569). Adam Sporzynski (Count 29), testified that he made his payments from Cleveland, Ohio "[b]y check sent to Chemical Bank in New York" (A. 5477-79). GXs 129N, O and P reflected receipt by Rio Rancho of the payment charged in the indictment (A. 5479-80). Khadijah Mohammed (Count 35), from Long Island City, testified that she mailed GX 135E, a cancelled check dated December 1, 1975 and payable to Rio Rancho, in "[t]he envelope that's provided for you to Chemical Bank" in New York (A. 2597, 2614-15). Samuel Kaufman (Count 36), testified that he wrote a letter (GX 136I; A. 5323-24) which he sent to Rio Rancho asking defendants to repurchase his property (A. 5323-24, 5335). The letter, dated April 28, 1975 and addressed to Rio Rancho in Albuquerque, contained Mr. Kaufman's home address in the Bronx at the top right hand portion. GX 136H, the letter Mr. Kaufman received back from Rio Rancho in response to his inquiry, acknowledged receipt of GX 136I (A. 5323-24). William Brindle (Count 44), testified that he had sent checks every month from Connecticut to cover his payments. (A. 2532-23, 2540-41). GX 144E, a cancelled check payable to Rio Rancho, dated July 8, 1976 and a prepayment notice, on which was written the notation "paid check No. 234 7-8-76", was received in evidence as additional proof of mailing. (A. 2532-33). Leon Fox (Count 61), of the Bronx, testified that he made his payments to the Chemical Bank in New York and that he had made a payment in October, 1975. (A. 2867). Dennis Finnerty (Count 64), also of the Bronx, testified that he sent GX 164E, a cancelled check payable to Rio Rancho and dated October 10, 1975, to Rio Rancho, Church Street Station, in an envelope provided by the company. (A. 2639, 2662-64). Berit Hampe (Count 67), testified that her monthly payments from Middlefield, Connecticut had been and were still being made on her 1969 purchase. (A. 297, 349, 355). GX 167A, a Rio Rancho statement of account, reflected that a payment had been made by her and received by Rio Rancho on July 3, 1975. (A. 10216).

With respect to this last document, GX 167A, defendants specifically urge that since the statement of account was introduced outside the presence of the jury, (without objection from defendants) (A. 5583-84), the jury could not have concluded that the Count 67 mailing took place. This claim is wrong. Even without GX 167A, the jury had heard evidence that Mrs. Hampe lived in Connecticut, the terms of Mrs. Hampe's contracts, that Mrs. Hampe had lived up to those terms and that Mrs. Hampe

[Footnote continued on following page]

that of the numerous victims who described their regular practice of sending payments from distant places to Chemical Bank in New York in envelopes provided by the company, and the various supporting documents introduced in evidence for each witness, clearly presented a proper basis for the jury to infer that each mailing had occurred. Since the use of the mails, like most other facts, may be established by circumstantial evidence, *United States v. Toliver*, 541 F.2d 958, 966 (2d Cir. 1976); *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir.), cert. denied, 404 U.S. 858 (1971), the evidence as a whole was more than sufficient.

Closely analogous to the facts presented here is *United States v. Fassoulis*, *supra*. In *Fassoulis*, four mailings were challenged. One was a letter which had attached an envelope front bearing a private postage meter mark. The three other letters had *no such attachments* and *no envelopes* were introduced to substantiate the mailings. This Court held that the jury reasonably could have concluded that all of the letters were mailed, based on the testimony of a secretary that she typed each of the letters in New York, and on evidence of receipt of the "mailings" by the addressee in Philadelphia. As here, the Court in *Fassoulis* also pointed to the national nature of the entire scheme as additional circumstantial proof of mailing, although the Government did not offer any evidence concerning the general practice of the addressee bank relative to its customs and usages regarding incoming mail. Here, unlike *Fassoulis*, the Government introduced evidence to the effect that it was the business practice of the company, as well as the custom and

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was in fact still making monthly payments. This evidence, together with the readily calculable duration of her payment period, and the testimony of Perlmutter as to the manner in which monthly payments were made, provided an ample basis for the jury to have found that the payment mailing was made on or about the date alleged in the indictment and that the payment was sent through the mails.



practice of each customer, to mail payments to the Chemical Bank in envelopes provided by the company. Such evidence of custom and practice itself was sufficient to establish the mailings. *United States v. Minkin*, 504 F.2d 350, 352 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Joyce*, 499 F.2d 9, 17 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). See also *United States v. Toliver*, *supra*, 541 F.2d at 966;\* *United States v. Dondich*, 506 F.2d 1009 (9th Cir. 1974).

Defendants reliance on *United States v. Dondich*, *supra*, and *United States v. Robinson*, 545 F.2d 301 (2d Cir. 1976), is misplaced. In *Dondich*, there was simply no evidence—circumstantial or otherwise—which permitted the jury to infer that the single letter there had been “sent” by mail. The “foundational evidence” as to business practice, absent in *Dondich*, was present in this case, from which an inference of mailing could be drawn.\*\* Similarly, *United States v. Robinson*, *supra*, was no more than a unique case in which this Court held that evidence of “non-receipt” could not, without more, support an inference of mailing.\*\*\* In brief, neither

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\* In *United States v. Toliver*, *supra*, a mail fraud case, where the scheme involved the filing of fictitious claims for unemployment compensation, this Court held that the testimony of a New York unemployment official that it was the usual practice to mail certain forms and unemployment checks, together with evidence that the various forms and checks there involved had moved on their usual rounds from the office to the employer and from Albany to Buffalo, provided sufficient circumstantial proof of mailing.

\*\* Indeed, the Court in *Dondich* suggested that proof of customs, usage or practice in the course of business, together with evidence that a letter was “sent” and received by the addressee, could be sufficient evidence to establish the mailing. 506 F.2d at 1010. See also *United States v. Robinson*, *supra*.

\*\*\* *Robinson* involved charges of, *inter alia*, possession of stolen mail. The Government proved there only that recipients of welfare normally received their checks in the mail, but did not on the occasions charged in the indictment. The prosecution’s complete failure to adduce any proof of mailing in the first instance, warranted the reversal which followed in that case.



*Dondich* nor *Robinson* control this case where the Government proved—either by direct or circumstantial evidence with respect to each mail-fraud count—that a use of the mails had occurred.\*

## **B. The Interstate Land Sales Counts—71, 72, 73, 75 and 79**

Defendants argue that since the exhibits which documented the airing of commercials and the commercials themselves were admitted into evidence out of the presence of the jury,\*\* the jury could not have found that the

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\* With reference to the testimony of Gusowsky, defendants argue that there was evidence that payments were made, or could have been made, other than by mail. This claim misrepresents the trial record. The fact that Gusowsky, after he moved to Rio Rancho, walked his payments over to the office, was brought up only in a colloquy conducted outside the presence of the jury. (A. 3974-75) After defendants consented to an amendment of the "Gusowsky" count mailing, (A. 3978, 3981-82), the only evidence heard by the jury was that all payments were mailed to the Chemical Bank in New York, as was plainly the fact for all investors who did not live at Rio Rancho. Thus, there was simply no testimony before the jury that payments were received in any other way. See *United States v. Toliver*, *supra*, 541 F.2d at 966.

The Government was not required to negate the possibility of every other method of imaginable delivery to the Chemical Bank, as is now claimed by defendants. The Government offered direct proof of the custom and practice of AMREP and direct proof of the customs and actions of the various senders. This was sufficient. See *United States v. Minkin*, *supra*. In fact, defendants did not cross-examine Perlmutter or any purchaser victim whose mailing is now challenged, as to their testimony regarding the method of payment. Nor was any contrary evidence presented during the defense case.

\*\* Government exhibits 171, 172, 173, 175 and 179, were affidavits of performance corresponding to the commercials alleged in Counts 71, 72, 73, 75 and 79. Government exhibits 171A, 172A, 173A, 175A and 179A, were the actual commercials which had been aired and similarly corresponded to the same counts.

defendants used interstate means of communication in selling lots at Rio Rancho.\* In the face of defendants' consent to the procedures followed at trial by the District Court, and defendants' own defenses and trial strategies, this last-ditch effort to upset their richly merited convictions should be rejected.

At trial, the Government proffered testimony from one purchaser that he had invested in Rio Rancho land after viewing a television advertisement for Rio Rancho.\*\* Subsequently, at the trial judge's insistence and out of the presence of the jury, the Government offered in evidence the actual commercials themselves, as well as the corresponding affidavits of performance, all corresponding to the Land Sales Act counts. (A. 5992-6004, 6656-57). Defendants did not object either to this procedure or to the exhibits themselves. Moreover, at no time after the exhibits were received did any defendant dispute that the commercials were aired and that they went to the sale of land at Rio Rancho.\*\*\*

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\* The commercials speak for themselves. Clearly, they were used to sell property at Rio Rancho.

\*\* Dennis Finnerty, a Rio Rancho lot purchaser, testified that he had seen an advertisement for Rio Rancho land on television, phoned the number that was advertised and was contacted by a Rio Rancho representative (A. 2640-41). Thereafter, based on the representations of his salesman, he purchased a lot in Rio Rancho for investment and possible retirement. (A. 2642-43).

\*\*\* The Government initially only had intended to offer the affidavits of performance to establish the fact that Rio Rancho commercials had been aired on the dates charged in the indictment. (A. 5992-93). In response to a request by the trial judge, prompted by defendants' initial objection, later resolved, that it was unclear that the commercials related to the sale of land, the Government then introduced, without objection, the actual commercials. (A. 5993-6004, 6656-57). Defendants had seen these commercials during the course of discovery and knew that they specifically related to the sale of land. The court did sustain an objection to GX 177 because the Government could not produce the actual commercial. (A. 6002-03).

In his charge, Judge Metzner specifically advised the jury of each of the essential elements of the offense under the Interstate Land Sales Act.\* The District Court then read each of the Interstate Land Sales Counts\*\* and informed the jury that "[t]he Government has introduced evidence of Rio Rancho commercials which were aired on both radio and television . . ." (A. 7988). The trial judge next advised the jury of the need to find that instruments of communication in interstate commerce were used and that a defendant "reasonably" could "foresee" use "of instruments of communication in interstate commerce." (A. 7988). Finally, Judge Metzner told the jury, "Of course, there is no dispute here about the actual airing of the television and radio advertisements," (A. 7988) a statement that was in all respects accurate.

No objection was taken to this portion of the court's charge.\*\*\*

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\* "In order to find a defendant guilty under a count charging a violation of the Interstate Land Sales Full Disclosure Act, the Government must establish beyond a reasonable doubt each of the following essential elements: \* \* \* Fourth. That the defendant or his agents directly or indirectly used means or instruments of communication in interstate commerce." (A. 7985-86).

\*\* The court stated:

"Count 71 alleges that on November 22, 1974, an advertisement for Rio Rancho land was aired over WOR-TV.

Count 72 alleges that on November 18, 1974, an advertisement was aired over WPIX-TV.

Count 73, that an advertisement on November 25, 1974 was aired over WNET-TV.

Count 75 alleges that an Advertisement was aired over WCBS-TV on March 25, 1975.

Count 79 alleges that an Advertisement was aired on July 6, 1973 over WCBS-Radio." (A. 7987-88).

\*\*\* The Government in its request to charge No. 17, requested an instruction concerning the Interstate Land Sales Act counts which would have informed the jury that proof of the commercials had been submitted (A. 8340). The court denied this request "except as charged." (A. 7470). Defendants' Request No. 36 also

[Footnote continued on following page]



Defendants' present belated contention that the jury was not familiar with the evidence proving the jurisdictional requirement for the Land Sales Act counts, is both wrong and comes with particular ill-grace, given defendants plain acquiescence in the procedures followed at trial. First, the jury had been advised by the trial judge—as was plainly the fact—that there was evidence in the record of the airing of commercials, as charged in the indictment. Indeed, Judge Metzner's marshalling of the evidence on this point was no different then telling the jury that certain facts—but not elements of the crime \*—had been stipulated to by the parties. Moreover,

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sought a particular charge on the Land Sales counts (A. 8261-62), but this request *made no mention* of the evidence received out of the presence of the jury and was also denied, "except as charged". (A. 7481).

Again, immediately preceding the court's charge, the Government pointed out to the court that the proof with respect to the Land Sales Act counts had been received in evidence outside the presence of the jury and that the jury would be unable to identify these counts in the indictment with the specific proof introduced. The Government asked the court to make some type of reference to the proof so that the jury would be aware of it. The court then informed the Government that "[t]hat's taken care of". (A. 7957). No objection to this procedure was raised by defendants.

After the charge the defendants took a general exception to all aspects of the charge in form other than as requested by them, but made no specific mention of the argument now raised. (A. 8005-07).

\* This Court's decision in *United States v. Singleton*, 532 F.2d 199 (2d Cir. 1976) is thus readily distinguishable. In *Singleton*, the trial judge failed to separately charge one of the essential elements of the crime and directly led the jury to believe that that element was conceded beyond a reasonable doubt. Here, by contrast, Judge Metzner, after charging that the jury had to find *each* of the separate elements beyond a reasonable doubt, merely summarized the fact that there was evidence which related to one of the essential elements. Thus, as even defendants argue, the *fact* of the commercial's airing on television itself was

[Footnote continued on following page]

the record makes unquestionably clear that defendants had, in effect, conceded the simple matter that certain commercials had appeared on television. Second, on the basis of Finnerty's earlier direct testimony on this point the jury was entitled to infer that such commercials specifically related to the sale of land. Cf. *United States v. Hopkins*, 357 F.2d 14, 17 (6th Cir.), *cert. denied*, 385 U.S. 858 (1966).\*

### C. Count 36—Samuel Kaufman

Appellants argue that the mailing alleged in Count 36—an unsolicited letter written by Samuel Kaufman to Rio Rancho Estates on April 28, 1975—was proved

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not sufficient to satisfy completely the essential element that defendants had used means of interstate commerce in connection with their fraudulent scheme. Nor did Judge Metzner purport to tell the jury that it was sufficient. His observation that there was "no dispute" as to the airing, related only to that fact, and not the essential element. This was a permissible comment on the evidence, particularly since no defendant had sought in any manner to suggest that the Government had not proved use of interstate commerce. See, *United States v. Natale*, 526 F.2d 1160, 1167-68 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976). Finally, unlike *Singleton*, the matter simply was of no consequence to any of the defense cases. Defendants obviously did not seek to defend this case on the overly technical ground raised in this Court. Rather, they claimed that they had done no wrong in their sales program, and that their representations were all factual. This was a far cry from *Singleton*, where at least two defendants had available an argument that no "theft" had been established, a matter which the trial judge there withdrew from the jury's consideration.

\* Similarly, the jury also had available the overwhelming evidence that all Rio Rancho publications distributed to the public specifically related to defendants' sales program. Since Rio Rancho Estates was not involved in any business other than the sale of land, obviously the jury could infer that televised advertisements related to the company's business. Indeed, common sense dictated that Rio Rancho had no other possible reason for use of such media facilities.

neither to have been caused by any co-schemer, nor to have occurred in execution of the scheme. Contrary to defendants' claim, this letter, (GX 136I; A. 5323-24), in which Kaufman asked Rio Rancho to buy back his 3 year-old property, clearly was a foreseeable consequence of the scheme proved at trial.

A person causes the use of the mails where "he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended . . ." *United States v. Pereira*, 347 U.S. 1, 8-9 (1954); *United States v. Maze*, 414 U.S. 395, 399 (1974); *United States v. Cyphers*, Dkt. No. 76-1131, slip op. 1737, 1740 (2d Cir. February 8, 1977); *United States v. Finkelstein*, 526 F.2d 517, 526-27 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976). So long as use of the mails was a regular and contemplated step in execution of the scheme before it reached fruition, the mailing comes within the mail fraud statute, even if the particular letter comes from one who already has been victimized. *United States v. Maze*, *supra*; *United States v. Marando*, 504 F.2d 126, 129-130 (2d Cir.), *cert. denied sub nom. Berardelli v. United States*, 419 U.S. 1000 (1974); *United States v. Braunig*, Dkt. No. 76-1448, slip op. 2773, 2782-83 (2d Cir. April 11, 1977). Kaufman purchased his property \* at a time when defendants represented to prospective purchasers that lots at Rio Rancho were almost all sold out and that a resale office soon would be established. (See pp. 16, 38-39, *supra*). Since a resale office was never established, it was only natural for defendants to anticipate that letters such as the one from Kaufman would be sent to Rio Rancho asking defendants to

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\* Mr. Kaufman purchased his property at a Rio Rancho sales dinner sponsored by ATC Realty. He was fully subjected to the whole range of representations as to investment value, resale and the direction and rate of growth of the city of Albuquerque.



repurchase lots. Indeed, defendants responded to Kaufman's letter with a form message,\* devised by defendants to answer such inquiries. Moreover, this form letter merely afforded defendants yet another opportunity to reiterate their basic sales claims and to lull the purchaser into holding onto his property. Obviously, it was a central part of defendants' continuing scheme to assure that landholders did not panic and "create waves," thereby jeopardizing their profitable venture. In fact, defendants' scheme depended in large measure on repeat business from "satisfied" customers. See *supra* at 20-25. *United States v. Cyphers*, *supra*, slip op. at 1743.

Thus, the Kaufman letter (GX 136 I) was both caused by defendants and was in furtherance of their scheme. Since such mailed correspondence clearly was a contemplated step in the execution of the entire fraud, it is of no moment that the particular letter was an unsolicited inquiry from a defrauded purchaser. See *United States v. Cyphers*, *supra*, slip. op. at 1740; *United States v. Finkelstein*, *supra*, 526 F.2d at 526-527.

### POINT VIII

**The Court's Rulings With Respect To Friend's Grand Jury Appearance And Testimony Were In All Respects Proper.**

**A. The Use Of A Portion Of Defendant Friend's Grand Jury Testimony At Trial Was Proper And Did Not Prejudice The Other Defendants**

The defendants argue that the District Court committed error when it permitted the Government to read to the jury Solomon Friend's grand jury testimony. This claim is frivolous.

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\* Mr. Kaufman identified GX 136H, a form letter, as Rio Rancho's response to his inquiry of April 28, 1975 (A. 5323-24).

Friend was general counsel, vice-president and a director of AMREP from about 1969 through the indictment in this case. Over a year after the grand jury investigation began, when his own conduct became subject to examination, he began to testify before the grand jury about the underlying fraud investigation.\* He was named as a co-defendant in both the original and superseding indictments. After the Government presented its case in chief, Friend's motion for a judgment of acquittal was granted. (A. 9587-88).\*\*

A small portion of Friend's grand jury testimony, carefully redacted to avoid all references to other defendants, was introduced against him during the Gov-

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\* He testified earlier about the failure to produce a certain corporate document.

\*\* Although defendants state in passing that the Government's case against Friend was marginal, the Government disputes that characterization and suggests that the acquittal of Friend was erroneous. Friend became counsel to AMREP in 1969, was vice-president since 1970 and a director since 1971. He was also an officer of Rio Rancho, Inc., ATC, Inc. and AMREP's Albuquerque realty company which received reports on local resales of Rio Rancho property. He was intimately familiar with all of the the Rio Rancho activities. (GX 409A).

Friend was thoroughly familiar with the Rio Rancho sales pitch because he reviewed the ATC party script (GX 586), all promotional literature used at dinners and the Rio Rancho film script. (GX 201; A. 5956-77). Friend made changes in these materials which made the pitch a little more subtle, but did nothing to change its basic appeal. In other words, he gave advice which endorsed the making of misleading statements.

Moreover, in 1970 and 1971 Friend actually assisted AMREP increase the size of Rio Rancho from 54,000 to 91,000 acres (GX 579, 584, 586, 732, 813; A. 10506-07, A. 10565) knowing that this would postpone indefinitely the already remote possibility that Rio Rancho "investors" would be able to resell their land. Since Friend was also in charge of development and construction he did far more than act as an attorney, and this combined with other activities, was more than enough to make him an aider and abettor.

ernment's case in chief. (A. 5956-77).<sup>\*</sup> Earlier Judge Metzner had excluded portions of the testimony, ruling that they were inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968). (A. 9581). However, upon the pre-trial appeal, this order of exclusion was reversed by this Court, which held that Friend's grand jury testimony "is not so clearly inculpatory as to any of the co-defendants that it cannot be admitted against Friend subject to a cautionary instruction that adequately protects these other defendants." *United States v. AMREP Corp.*, 545 F.2d 797 (2d Cir. 1976). (A. 9475). Accordingly, pertinent portions of Friend's grand jury testimony were admitted against him with a proper cautionary instruction that the testimony could not be considered against any other defendant. (A. 5956). The testimony was stricken after Friend was acquitted. (A. 6260-61).

The defendants do not now contest the admissibility of Friend's grand jury testimony; nor do they suggest that the cautionary instruction was defective. However, they argue that the District Court should have anticipated that it would subsequently acquit Friend and should have prohibited the reading of Friend's grand jury testimony until after the decision on motions at the end of the Government's case. No authority is cited for withholding from the jury properly admitted evidence until after the close of the Government's case and, absent such authority, defendants cannot convincingly argue that the District Court committed error by declining to exercise its discretion and to adopt their suggestion that Friend's testimony not be read in the ordinary sequence of events.

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<sup>\*</sup>The portion of Friend's testimony admitted into evidence consists primarily of his testimony that it was *his own* belief that Rio Rancho would not become fully developed in his life time (A. 5965), and that it would take about eighty years even for the company owned building areas to be developed and for utilities to extend beyond these areas. (A. 5969-70).



Moreover, since this Court has already held that the admission of Friend's testimony would not prevent the defendants from getting a fair, joint trial, it is hard to see how they failed to get a fair trial where a cautionary instruction was given. It is now clear that Friend's testimony was not even indirectly inculpatory as to them and certainly not "vitally important" to the case against them.\* Of course, it is properly presumed that the jury followed the District Court's instructions to consider Friend's grand jury testimony only against him and that it obeyed the directive to ignore his testimony after it was stricken. *United States v. Rosenwasser*, Dkt. No. 76-1260, slip op. 205 (2d Cir. Feb. 24, 1977). Accordingly, the defendants can claim neither error nor prejudice resulting from the admission of Friend's grand jury testimony.

**B. The Questioning Of Friend In The Grand Jury Was Proper And Does Not Require Dismissal Of The Indictment**

Without any support in this record, the defendants Carity and Friedman glibly assert that the questioning of Friend in the grand jury violated their Sixth Amendment rights and the attorney-client privilege and that the indictment should therefore be dismissed.\*\* This argument was rejected by the District Court and should be rejected again by this Court.

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\* In his testimony Friend states only his own views. There was overwhelming independent evidence from which the jury could conclude that the defendants knew that their advertising theme of growth and profitable investment was false and misleading.

\*\* They do not claim that any privileged material was introduced against them at trial.

# 1. The Government Did Not Breach the Defendants' Attorney-Client Privilege or Sixth Amendment Rights

When Friend appeared before the grand jury, he was warned by the Government not to violate any attorney-client privileges. (A. 9048-49, 9161-62). There is no basis in this record for asserting that the privilege was breached.\* The defendants' first assertion that a breach occurred rests on Friend's production of certain documents before the grand jury. These documents came to the grand jury's attention when Friend testified that some allegedly privileged documents would tend to show his innocence. (A. 8865-67, 9053). At the Government's suggestion, Friend moved for permission to use the documents in order to defend himself before the grand jury. (A. 8683-85). The matter came before Judge Duffy, who was told by Mr. Arkin, then counsel for all defendants, that all of his clients waived any objections to the grand jury receiving the documents.\*\* Having specifically waived any claims based on the attorney-

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\* Apart from the fact that no breach of the privilege occurred, as Judge Metzner ruled (A. 9568), the individual defendants have no standing to raise the attorney-client privilege since Friend was the corporation's counsel, not counsel to the individual defendants. *United States v. Silverman*, 430 F.2d 106, 122 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971); *United States v. Bartlett*, 449 F.2d 700, 704 (8th Cir. 1971); *Young v. Taylor*, 466 F.2d 1329 (10th Cir. 1972); *In Re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975).

\*\* Mr. Arkin told Judge Duffy on behalf of all defendants: "we have no objection to these documents going in"; "... we waive the attorney-client privilege to this very limited extent as to these particular documents . . ." "we think these documents would be helpful to the grand jury and helpful to my client, the corporation, as a whole." (A. 8675-76, 8680-81). Mr. Arkin merely specified that he did not wish his waiver of privilege as to these documents to be construed as a waiver to anything else.

client privilege, the defendants now argue that the production of these documents breached the privilege. Their waiver in the District Court clearly precludes the argument in this Court. *United States v. Braunig, supra*

Moreover, in pressing the argument in this Court, the defendants have failed to pinpoint the documents claimed to be privileged. In addition to that glaring deficiency they have never produced, not even when a document was held privileged during grand jury proceedings, an appropriate corporate official, with personal knowledge, to articulate any facts to meet the burden of establishing the privilege for any documents.\* This failure requires that their claim as to the documents be rejected.

The defendants also claim that on two occasions Friend disclosed confidential communications from the defense camp. (A. 8663-64). (Br. 52). The first instance cited is Friend's grand jury testimony that defense counsel were debriefing grand jury witnesses. Secondly, defendants protest that Friend conveyed vague information about the depth of water at Rio Rancho, which he learned from a debriefing of grand jury witness Goodwin.

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\* This court has repeatedly held that a person claiming the attorney-client privilege has the burden of establishing all of the essential elements. The Government need not show anything, let alone the absence of one of the elements. *United States v. Stern*, 511 F.2d 1364 (2d Cir. 1975); *In re Bonnano*, 344 F.2d 830, 833 (2d Cir. 1965); *Calton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). The record here consists only of allegations based upon defense counsel's affidavits wholly lacking in personal knowledge. Such allegations are insufficient to sustain the privilege or even to call for a hearing. *United States v. Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1970); *United States v. Gillatte*, 383 F.2d 843, 846-49 (2d Cir. 1967); *United States v. Pardo-Bolland*, 229 F. Supp. 473, 475 (S.D.N.Y. 1964), *aff'd*, 348 F.2d 316 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965).



These claims of Sixth Amendment violations based on governmental intrusion into the councils of the defense are unsupported in fact or law. Friend's contacts with his co-defendants were not undertaken on behalf of the Government. Generally, where co-defendants consult, if they are not government agents, there is no constitutional restraint on their ultimately divulging what they have learned. *United States v. Rosner, supra.*\*

Moreover, it must be remembered that it was the defendants who chose to be represented jointly and to confer with each other and counsel during the grand jury proceedings. In making that choice they ran the risk that any one of the defendants would decide to reveal communications with his co-defendants. To the extent that there was a privilege or right to confidentiality attached to consultations within the defense group, any single defendant could properly choose to waive the privilege.

However, this is certainly not a case where other members of the defense camp were surprised by Friend's actions. The defendants or their counsel knew that Friend would testify on January 28, 1975, and knew that he was testifying on ten separate occasions, and yet apparently continued to consult him and to convey informa-

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\* Of course the council of defense or work product theory, like the attorney-client privilege, requires that the objecting party must establish each element and must particularize the communication complained of. The fact that two co-defendants communicate to each other does not itself establish the existence of a joint defense or that the communications were made to assist a joint defense. See *United States v. Gartner*, 518 F.2d 633, 636 (2d Cir. 1975); *Smale v. United States*, 3 F.2d 101 (7th Cir. 1924); *Leonia Amusement Corp. v. Loew's Inc.*, 13 F.R.D. 438 (S.D.N.Y. 1953). What is divulged by and to the clients during joint defense cannot be deemed confidential *inter sese*. See, e.g., *Grand Trunk Western R.R. Co. v. H.W. Nelson Co.*, 116 F.2d 823, 835 (6th Cir. 1941); C. McCormick, *Evidence* § 91 at 189-90; 8 Wigmore, *Evidence* (McNaughton Rev. 1961) § 2312 at 605-06.

tion to him. Friend's testimony was an attempt to exculpate himself and AMREP, and it seems fair to assume that other corporate officers were content to permit Friend to make out their corporate and, derivatively, their personal defenses, without running the risk of personally testifying.

In arguing that there was an intrusion on the attorney-client relationship, defendants rely on *In re Terkel*, 256 F. Supp. 683 (S.D.N.Y. 1966). However, that case is of no application here. This Court has noted that *Terkel* must be limited to its facts "since there the attorney was sought to be examined after indictment of his client, and his investigation and preparation were the objects of the inquiry." *United States v. Colasurdo*, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972). Defendants' reliance on *United States v. Mitchell*, 372 F. Supp. 1239, 1245 (S.D. N.Y. 1973) is equally misplaced since it ignores the limitation placed on *Terkel* by *Colasurdo* and the limitation placed on the Sixth Amendment's reach by the cases cited *supra*. Moreover, *Mitchell* concluded that dismissal of the indictment even on a much more definitive showing than here was inappropriate.

## **2. There Is No Authority To Dismiss This Indictment Because Of Friend's Grand Jury Testimony**

Apart from the fact that the defendants have shown no violation of their rights, the defendants' request for a dismissal of the indictment based on Friend's grand jury testimony is totally foreclosed by applicable authority. In *Lawn v. United States*, 355 U.S. 339, 349 (1958), the Supreme Court held that

"an indictment returned by a legally constituted nonbiased grand jury, like an information drawn

by a prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment."

The Supreme Court has recently cited *Lawn* to reject again a proposition equivalent to the one advanced here by defendants: "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted . . . on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination." *United States v. Calandra, supra*, 414 U.S. at 345.\*

Defendants have not been able to cite one case where an indictment was dismissed for violation of the attorney-client privilege. In fact, the Second Circuit has explicitly rejected a similar application. *United States v. Colasurdo, supra*. There the Government interviewed various attorneys, and three of the defendants' attorneys testified before the grand jury. The defendants sought dismissal of the indictment for a failure of the trial court to hold a preliminary hearing on whether the grand jury had before it evidence obtained in violation of the attorney-client privilege. This Court stated:

"Even if correct, appellants' assertions would not be grounds for dismissing the indictment. *United States v. Blue*, 384 U.S. 251, 255 (1966); *Lawn*

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\* In *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964), relied on by defendants, this Court held that there was no right to dismiss an indictment based in part on inadequate or incompetent evidence. "As long as there is *some* competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed." The *Tane* indictment rested exclusively on the testimony of a witness derived from illegal conduct, and therefore was dismissed. Here, even defendants in their most extreme claims do not suggest the indictment rested exclusively or primarily on the trivial items they point to as privileged.



v. *United States*, 355 U.S. 339, 348-50 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956) (indictment based on hearsay). Otherwise, before trial on the merits there would always be a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury, with resultant delay." 453 F.2d at 596.

Accord, *United States v. Mackey*, 405 F. Supp. 854, 861-63 (E.D.N.Y. 1975) (Weinstein, J.) (holding that in light of *Costello*, *Lawn* and *Calandra*, an indictment may not be dismissed because the grand jury received information in violation of the Fifth Amendment or the attorney-client privilege).\*

The defendants assert that alleged governmental intrusion into advice of counsel or councils of defense requires automatic dismissal. However, even in situations where Governmental intrusion into some aspect of the defense case has occurred, courts will not mandate dismissal absent a showing of prejudice. *United States v. Mosca*, *supra*, 475 F.2d at 1061; *United States v. Zarzour*, 432 F.2d 1 (5th Cir. 1970); *see also North Dakota v. Long*, 465 F.2d 65, 72 (8th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973); *Manuel v. Salisbury*, 446 F.2d 453 (6th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972). The

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\* The only other theoretical grounds for dismissal would be an exercise of the court's supervisory powers over prosecutorial misconduct. *See United States v. Estepa*, 471 F.2d 1132, 1136 (2d Cir. 1972). However, any claim of prosecutorial misconduct is entirely out of place here. Friend testified as an experienced attorney with the assistance of his own personal attorney, and with the full knowledge of his client, who it appears debriefed him following his testimony. Friend was repeatedly instructed by the prosecutor that the grand jury did not want any information which was the valid subject of attorney-client confidentiality, and he was as knowledgeable as anyone else as to what communications were arguably privileged. Certainly, there is nothing else either required of the prosecutor, or that could have been done, short of preventing Friend from testifying at all.

Second Circuit "has never adopted the *per se* rule", *United States v. Gartner, supra*, 518 F.2d at 637, and has explicitly held that the *per se* rule would have no application unless the Government has been guilty of pernicious and corrupting misbehavior, *United States v. Rosner, supra*, 485 F.2d at 1227. To call the Government's conduct here pernicious is to do violence to the English language. A dismissal on such grounds is totally unjustified.

### POINT IX

#### **The Superseding Indictment Was Properly Returned.**

At a pre-trial conference held on June 22, 1976, the trial court expressed concern that the original indictment returned in this case was too long and detailed. The court directed the Government to present a plan by July 13, 1976, for reducing the allegations in the indictment. To meet the directive of the trial court, on July 13, 1976, the Government reconvened the original grand jury and presented for its consideration a superseding indictment which eliminated evidentiary detail included in the original indictment. The grand jury returned the superseding indictment on that day. The defendants argue to this Court that the indictment should be dismissed because the grand jury could not have properly deliberated on the superseding indictment. This argument is frivolous.

This entire claim is premised on the erroneous assumption that the superseding indictment presented new allegations not contained in the original indictment. Specifically, defendants argue that the superseding indictment made new charges regarding the actual development at Rio Rancho and the refund-cancellation privilege contained in the purchase contracts. However, a comparison of the original indictment with the superseding

indictment refutes this claim. The superseding indictment neither expanded the Government's theory nor contained new allegations.\*

Appellants go on to argue that even if the superseding indictment did not add new charges, the indictment should have been dismissed because the grand jury returned the superseding indictment on the same day that it reconvened and therefore no "meaningful" deliberations took place. This argument overlooks the fact that the grand jury which voted the superseding indictment was the same grand jury which had returned the original indictment. During the lengthy period of this grand jury investigation, the grand jurors had ample time to weigh the evidence and the testimony.\*\* See *United States v. Stamp*, 458 F.2d 759, 765-68 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 975 and 409 U.S. 842 (1972). In voting the superseding indictment, the grand jury was entitled to use evidence that it had heard before. *United States v. Cooper*, 464 F.2d 648, 654 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); *United States v. James*, 290 F.2d 866 (5th Cir.), *cert. denied*, 368 U.S. 834 (1961).

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\* Paragraph 14 of the superseding indictment (A. 14) deals with the installation of water and utilities in company-owned building areas as well as the so-called "exchange privilege" (see pp. 25-31, *supra*). Paragraphs 16 (A. 8401), 18(n) (A. 8421-22) and 18(o) (A. 8422-25) of the original indictment contained the same charges only in greater detail. Similarly paragraph 17(1) of the superseding indictment (A. 19) deals with the refund-cancellation privilege (see pp. 23-25, *supra*). The same charges were contained in paragraph 18(g)(xv) (A. 8408) and 18(g)(xvi) (A. 8408-09) of the original indictment, only in greater detail.

\*\* The grand jury which returned both indictments was a Special Consumer Fraud grand jury. It was empanelled in February, 1975 and heard evidence in this case almost exclusively and on a continuous basis until it returned the original indictment on October 28, 1975.



In effect, defendants are asking this Court to step inside the grand jury and virtually monitor the thought processes of the grand jurors. This Court has refused to do so in the past where similar unsupported and speculative allegations have been made. *United States v. Bertolotti*, 529 F.2d 149, 159 (2d Cir. 1975); *United States v. Dzialak*, 441 F.2d 212, 217 (2d Cir. 1971); *United States v. Birrell*, 447 F.2d 1168, 1173 (2d Cir. 1971). Defendants have offered no compelling reason to depart from this well-settled and sensible rule.

### CONCLUSION

**The judgments of conviction should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
                                  ) ss.:  
COUNTY OF NEW YORK)

*Patricia M. Hyman* being duly sworn deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the *16th* day of *June* 1977 she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

*Curtis, Mallet - Prevost, Colt & Mosle*  
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And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

GLADYS D. D'ANGELO  
NOTARY PUBLIC, State of New York  
No. 4015641, Suffolk County  
Expires March 30, 1979

*Patricia M. Hyman*

Sworn to before me this

*16th* day of *June*, 1977

*Gladys D. D'Angelo*



